

152f

R E P O R T S
OF
C A S E S
RELATIVE TO
THE DUTY AND OFFICE
OF A
JUSTICE of the PEACE,
FROM
Michaelmas Term 1776, inclusive,
TO
Trinity Term 1785, inclusive.

P A R T II.

By THOMAS CALDECOTT,
OF THE MIDDLE TEMPLE, Esq.

L O N D O N :

Printed by His MAJESTY'S Law-Printers,
For P. U R I E L, *Inner Temple Lane,*
MDCCLXXXIX.

10



A

T A B L E

O F T H E

N A M E S of the C A S E S.

A.		E.	
	Page		Page
R EX v. Inhabitants of An-		Rex v. Inhabitants of Edifore	
dover	373	otherwise Hedfor	371
Atkins et al', v. Davis et al'	315	— Inhabitants of Endon,	
		Longsdon and Stanley	374
B.		F.	
Rex v. Inhabitants of Bagworth	179	Rex v. Franklyn	244
— Justices of Bedfordshire	167		
— Inhabitants of Great Book-		G.	
ham	290		
— Inhabitants of Little Bol-		Rex v. Inhabitants of Grendon	
ton	367	Underwood	359
C.		H.	
Rex v. Inhabitants of Chew		Rex v. Hartley	175
Magna	365	— Inhabitants of Hedfor, <i>see</i>	
— Compton et al.	246	— Edifore	371
			Rex

NAMES OF THE CASES.

	<i>Page</i>		<i>Page</i>
Rex v. Inhabitants of Henfing-		Rex v. Inhabitants of St. Peter	
ham -	206	and St Paul, in Bath	213
— Hogg -	267	— Justices of Peterborough	238
— Inhabitants of Hope Man-		— Pickersgill et al' -	297
fell -	252	— Sir John Powell Price Bart.	305
— Horner et al' -	295		
— Justices of Huntingdon-		R.	
shire -	283		
I.		Rann, Clerk, v. Pickin et al'	196
		Robson v. Hyde Esq; et al.	310
Rex v. Inhabitants of St. James		S.	
Bury St. Edmunds	385		
— Inhabitants of Iveston	288	Rex v. Inhabitants of Seagrave	247
L.		— Stanley -	172
		— Stevens -	302
Rex v. Inhabitants of St. Law-		— Inhabitants of Swalcliffe	245
rence Winchester	379	T.	
Ledwith v. Catchpole -	291		
Rex v. Edward Pryse Lloyd,		Rex v. Inhabitants of Tarrant	
Esq; -	309	Launceston -	209
Lowndes, Esq; v. Lewis, Clerk	188	— Tottington Lower End	284
M.		U.	
Rex v. Inhabitants of Mitcham	276		
N.		Rex v. Inhabitants of Upton	
		Gray -	308
Rex v. Inhabitants of St. Ni-		W.	
cholas Gloucester -	262		
P.		Rex v. Peter Waldo, Esq;	358
		Wetherell Esq; v. Hall	230
Page Esquire, v. Howard	228	Rex v. White and Eling, Over-	
Rex v. Pedley -	218	seers, &c. -	183
		— Inhabitants of Wintersett	298
		— Inhabitants of Woodsford	236

HEADS

A.				B.			
			Page				Page
Abandonment			284	Bail	-	-	295
Abatement	-	-	298	Bastards	-	-	213
Ability	-	-	315	Bastardy	-	-	308
Absence	-	-	284, 298, 359	Breaking Hedges	-	-	302
Acquiescence	-	-	248				
Acts of Parliament	-	-	266				
Actual Possession	-	-	218				
Adjudication	-	-	172				
Administration	-	-	365				
Alms-house	-	-	358				
Animus furandi	-	-	295				
Appeal	-	-	172, 248, 283				
Apprenticeship	-	-	367				
Arrest	-	-	291				
Arson	-	-	218				
Affault	-	-	244				
Averment	-	-	175				

C.			
Cathedrals	-	-	238
Certainty	-	-	373
Certificate	-	-	213, 252
Certiorari	-	-	172, 297, 309
Chapel	-	-	310
Charity	-	-	358
Clergy	-	-	188
Colleges	-	-	238
Commencement	-	-	298, 359
Commitment			

	C.		
Cathedrals	-	-	238
Certainty	-	-	373
Certificate	-		213, 252
Certiorari	-	172, 297,	309
Chapel	-	-	310
Charity	-	-	358
Clergy	-	-	188
Colleges	-	-	238
Commencement	-		298, 359
			Commitment

HEADS of PRINCIPAL MATTERS.

Commitment	-	-	Page 295
Composition	-	-	196
Consent	-	-	247
Conspiracy	-	-	246
Constable	-	-	252, 291
Contract	-	-	367
County	-	-	302
County Election Act	-	-	374
Convertibility	-	-	367
Conviction	-	-	-175, 302

D.

Depositions	-	-	295
Deputy	-	-	252
Description	-	-	373
Dispensation	-	-	359
Dissolution	-	-	247, 298, 248
Diverting Roads	-	-	228
Division	-	-	302
Dogs keeping	-	-	175
Dogs using	-	-	175

E.

Election Act	-	-	374
Emancipation	-	-	284
Equitable Estate	-	-	230
Estate for life	-	-	188
Evidence	-	-	175, 206, 236
Examination	-	-	179, 308
Exception	-	-	359
Excise	-	-	244
Execution of	-	-	252
Extraparochial	-	-	167, 238

F.

Fact	-	-	374, 379
Felony	-	-	218, 291, 295

Filiation	-	-	Page 308
Form	-	-	373
Fraud	-	-	247, 248, 295

G.

Game	-	-	175, 188
Game Laws	-	-	230

H.

Hedges	-	-	302
Highway Act	-	-	228
Hiring constructive	-	-	206
Hiring new	-	-	179, 206
Hiring ejusdem generis	-	-	298, 359
Hiring and service	-	-	288, 298, 359, 367
Hiring weekly	-	-	179
Hue and Cry	-	-	315
Hundred	-	-	ib.

I.

Illness	-	-	298, 359
Incumbrances	-	-	230
Indictment	-	-	183, 246
Information	-	-	246, 291
Inhabitant	-	-	276, 315
Inns of Court	-	-	238
Intendment	-	-	308
Intention	-	-	367
Judgment	-	-	308
Jurisdiction	-	-	183
Justice of Peace	-	-	302

L.

HEADS of PRINCIPAL MATTERS.

L.		Page
Labour, produce of	—	266
Laches	—	206
Landlord	276, 365, 374, 379,	385
Land-tax	— 276, 374, 379,	385
Larceny	—	295
Lease	—	209
Legal Estate	—	230

M.		Page
Maintenance	—	298
Malum in se	—	218
Mandamus	—	167, 238
Manufactures	—	266
Marriage	— 206, 236,	246
Mechanical Instrument	—	266
Militia	—	183
Modus	—	196
Mortgage	—	230

N.		Page
Next of kin	—	365
Notice	—	283
Nurture	—	284

O.		Page
Occupation	—	358
Occupier	—	276, 365
Office	—	252
Officer of Excise	—	244
Order	—	172, 308, 373
Order of Removal	—	179, 248
Overseers	—	167, 183, 238

P.		Page
Personal Property	—	266, 315
Poor	—	310
Preamble	—	213
Presence	—	308
Presumption	—	252, 308, 371
Profits	—	262, 310
Purchase	—	209
Putative Father	—	308

Q.		Page
Qualification	—	138, 230

R.		Page
Rate	196, 262, 266, 276, 310, 358,	365, 374, 379, 385
Rateability	—	315
Receipt	—	385
Recital	—	183
Removal	—	283
Representative	—	365
Rescue	—	244
Residence	—	209
Return	—	297
Riot Act	—	315

S.		Page
Seal	—	297
Service	—	179, 247
Services connecting	—	206, 288
Service and hiring	—	288
Service, last day	—	288
		Sessions

HEADS of PRINCIPAL MATTERS.

	Page
Sessions	283
Settlement, maiden	206, 236, 371
Settlement prima facie	371
Sickness	298, 359
Smuggling	244
Stopping Roads	228
Substitute	183
Sum in gross	183
Summons	179
Surrender	209
Suspicion	291

T.

Tenant	276, 365, 374, 379, 385
Tythes	196
Tolls	262

U.

	Page
Uncertainty	373
Usage	266

V.

Vill	167, 238
------	----------

W.

Wages	298, 359, 367
Waiver	298
Weighing Machine	262
Widow	236
Wife	206, 371
Workhouses	213

Easter

1782.

Easter Term

22 Geo. 3. 1782.

Rex v. Justices of Bedfordshire.

Wednesday,
April 29.

COWPER, H. had obtained a rule to shew cause why a mandamus should not issue, directed to the Justices of the county of Bedford, to appoint an overseer of the poor for the vill of *Chicksands* in that county.

The facts upon the affidavit in support of the rule were, that the vill of *Chicksands* consisted of a capital mansion house, called the *Priory*, and a large farm-house thereto belonging, of the yearly value of 200 *l.* in the occupation of *Sir George Osborn*, baronet; and also of three other large farm-houses, with three other farms, altogether of the farther yearly value of 500 *l.* That about forty years ago there was another farm-house and farm in the said vill, but that the house is now pulled down, and the farm occupied by *Sir George Osborn*: that in the said vill there was also a water-mill, now pulled down: that there is a chapel in the vill for the celebration of divine service: that there immemorially has been, and now is, a constable appointed in and for the said vill; and that there are within it four substantial householders, but no churchwarden or overseer. These facts were sworn to by *Joseph Cooper*, who had about forty years before rented the farm-house, now pulled down, together with the farm now in the occupation of *Sir George Osborn*.

Against the rule it was sworn by *James Bevan*, one of the then tenants of *Sir George Osborn*, that he had lived in *Chicksands* thirty-eight years: that it all belonged to *Sir George*: that he never knew any constable, headborough, tithingman, or other peace officer appointed or sworn in there, or any poor-rates therein; and that it is, and ever had been, extra-parochial.

These facts were also sworn to by *John Blackford*, who became steward to *Sir George Osborn*'s father forty-seven years before; and

Z

then

To obtain a mandamus to justices to appoint overseers, it must expressly be sworn, that the place in question either is, or is reputed to be, a vill.

1782.

REX v. JUSTICES OF
BEDFORD-
SHIRE.

then lived in *Cbicksands*; and by *Richard Gresham*, then a tenant in *Cbicksands*, and also for the last eleven years steward to Sir *George Osborn*: and they farther swore, that the one formerly as servant to Sir *Danvers*, the father of Sir *George Osborn*, always used to execute, and that the other, as servant to Sir *George Osborn*, now does execute, the precepts issued by the chief constable of the hundred of *Clifton*, in which *Cbicksands* is situated.

And it was also sworn by Sir *George Osborn*, that he had been since 1753 owner of *Cbicksands*: that by reputation it was formerly a monastery, and came to the crown at the time of the dissolution of monasteries: that it never was reputed a vill: that it was always deemed extra-parochial: that the chapel is a private chapel in his mansion-house, not under the jurisdiction of the bishop, and not having any burial place or chapel wardens: that the person officiating therein, is nominated by the owner of the estate, upon whose pleasure his stipend is dependant, and at whose pleasure the chapel is also shut up: that service is never performed there, when the owner and his family are absent; and that the chapel had been changed from one room to another by Sir *George's* father.

Wallace shewed cause against this rule; and insisted, that, before the court would interpose compulsorily, and order the justices to act contrary to their own impressions of duty upon the subject, they would require proof, that the place in question had at some time been reputed, a vill: that, to constitute a vill, it must appear, that there was, or at some time had been, a public officer of some known legal description therein: that on the contrary, nothing appeared in this place more than the domestic oeconomy of a private family: that the chief constable's precepts, the only process of a public nature executed within the place, were always executed by one of the servants of the family; but that this person was never sworn in or appointed to any such office: that the constable had been introduced into the affidavit on the other side to meet the case of [a] *Waldron v. &c.*; where it is said by *Hale*, Ch. J. "That one parish may contain several vills, i. e. where there are distinct constables in every one of the vills." That this was probably the place that was alluded to, as extra-parochial, by *Holt*, Ch. J. in the case [b] *inter* the inhabitants of the precinct of *Bridewell*, and the parish of *Clerkenwell*; as it is stated to be the

[a] M. 22 Car. 2. 1670. 1 Mod. 78.

[b] H. 41 W. 3. 2 Salk. 486.

case of *Sir John Osborn*: that it had been adjudged in the case [a] between the parishes of *Stoke Prior*, and the inhabitants of the manor of *Grafton*, that five houses, without any parochial officers, or the reputation of a vill, would not constitute a vill: and that, from the principle laid down in this case, as well as in that [b] between the parishes of *Denbam* and *Delbam* in *Suffolk*, to induce the court to interpose, it was absolutely necessary that the place in question should have the reputation of a vill. He also observed, that the rule was drawn up for the appointment of *one* overseer; but that the court could only direct an appointment *generally*, the number of them being [c] in the discretion of the justices.

Cowper H. in support of the rule admitted, that it could not be supported, unless this place appeared to come within the denomination of a township or vill [d] under the stat. 13 & 14 *Car. 2.*; but contended, though it had not been exactly defined what these were, that Mr. Justice *Blackstone* having [e] stated, "tithings, towns and vills to be of the same signification in law," and it being laid down in [f] *Charley* parish's case, "that a vill and a constable are reciprocal," the circumstance of there being a person here, who always exercised the office of a constable for this place, was decisive: that it was true, there had not been any such officer appointed with all the formalities of the law, because such appointment must have concluded upon a question which had been long in contest; but that the constant execution of precepts within the vill demonstrated the necessity of the appointment of such an officer: that it being out of their precincts, no other constable, unless under a particular appointment [g] was authorised to execute it; that it was evident, that the owner of the vill had so managed the matter of the constable, and taken care that no other than one of his own servants should interfere in the execution of process, for the very purpose of avoiding the necessary consequences of a regular appointment; but that the court would not give him the effect of his dexterity, to the injury of the public: that the fact of this

1782.

REX v. JUSTICES OF
BEDFORD-SHIRE.

[a] E. 10 Geo. 2. 1737. 2 Str. 1071. Burr. Settl. Cas. 101.

[b] E. 8 G. 2. 1735. 2 Str. 1004. Burr. Settl. Cas. 35.

[c] St. 43 Eliz. c. 2. f. 1.

[d] c. 12. f. 21.

[e] Comm. vol. 1. 114.

[f] 9 W. 3. Salk. 99.

[g] So Salk. in loc. citat. and in the case of the village of *Charley*, Tr. 11 W. 3. 1 Salk. 176. which seems to be the same case. 2 Hawk. P. C. 86. Rex v. *Chandler* 11 W. 3. 1699. 1 Ed. Raym. 546. *Roe, Kendale and Others*, M. 7 W. 3. 5 Mod. 81. Sed vide 2 H. H. 110. and 1 H. H. 582.

1782.

REX v. JUSTICES OF
BEDFORD-SHIRE.

duty being always discharged by the same person, founded so strong a presumption of his being a regular officer, as to justify the affidavit in support of the rule: that the stat. of *Car. 2.* was made [a] to remedy the want of appointment of constables, by lords of hundreds and manors, in whom, of common right, the power was lodged: that no case had gone so far as to say, that a place, circumstanced as this, was not a vill: that it was only settled that two houses would not constitute a vill; and the sole reason assigned was, that there could be no one in such case over whom overseers were to exercise a jurisdiction, and that they must continue for ever in office: that with respect to the chapel, all the tenants within the vill had constantly, and as of common right, resorted to it: that this fact was strong evidence of its public nature, and not consistent with the idea of its being a private family chamber: that this must be so, for the chapel had formerly belonged to the priory [b] of *Chicksands*: that this place was described [c] as a vill in *Domesday*, and as a parish in [d] extracts from the Augmentation office: that, including the mansion or priory, the

[a] Vide 2 Hawk. P. C. 63, 65. 1 Bac. Abr. tit. A.: and that the *Manor* of *Chicksand* was granted to the Prior and Convent of *Chicksand* appears by a charter of Edward the Second, Dugd. Monast. 2. 794.

[b] That this was a priory, vide Dugd. Monast. 2. 793, 794. 1. 450, 451, and Tanner's Notitia Monast. 5.

[c] fol. 218.

Bedfordshire.

Terra Uxoris Radulfi Tailleb

In Clifton Hund.

In Chichesana ten. 111 sochi 111 hid &c.

In eadem Villa &c.

[d] In the particular for a grant, of divers lands, &c. to Rychard Snowe, in the 31st year of the reign of king Henry the Eighth, remaining in the Augmentation Office at Westminster.

Com. Bedd.

Pcell possessionu. nup. Monast. de Chykesonde in dco Com. Bedd.

Firma unius domus voc. le Dayry Howse cum omibz & singlis al terr dnical in Chykesond *infra prochia de Deane* in com. Bedd. prædict.

Curator Eccle pchial de Deane al Chykesonde per Ann

CVI : VIII

Pcur & Sinodal ibm per Ann

XIIII

IIII

This

This bynne all the landes & possessionys lyeng & beyng wⁱⁿ Chykesonde aforseyde in the prysh of Deane.

P me Willm Cavendish Audit. ibm.

Bosc. ptin. nup. Monast. de Chikfand *infra prochia de Deane*

Feb. 25 Ann. H. 8. 31.

Thoms Crumwell } Virtute Co—fs
Rychard Ryche } Regs.

These extracts, properly authenticated and duly stamped, were read by Mr. Cowper; but, not having been made part of the affidavit, which was the ground of the rule, the Court would not notice them.

annual

annual value of the whole of this property was little less than 800 *l.* *per ann.*; a quantity of interest that ought not to be permitted, by finesse and management, to exempt itself from a fair participation of public burthens; and that at any rate the granting of this rule could not conclude the parties; as, by a return to the mandamus, the question, whether vill or not, must be raised and receive a solemn decision. That, had the application been to command the appointment of *more* than one overseer, it might then have been said to controul the exercise of that discretion which is lodged in the justices: but that, if the court interposed at all, they could not order a less number; and that by such interposition the justices would not be restrained from nominating more, if they saw occasion.

Lord Mansfield. Whatever you may do hereafter, when the facts alledged are made a part of the case, you now come upon a false foundation. To support this application, it is necessary, that the place should be a vill; but you have not said that it was ever so reputed, or even that you believe it to be one; and Sir George Osborn's affidavit says, it never was so reputed. You next deceive the court by a false suggestion, that there is a constable, and that a constable has immemorially been appointed. It is not true; and the argument is only, that one ought to be appointed. Next, as to the chapel, it is only a private chamber in the house; sometimes one and sometimes another, as suits the conveniency of the family; used for religious purposes when they are in the country, and when they remove from it, shut up, or used indifferently with the other parts of the house. Is it possible that this can be the chapel of a vill?

Buller, J. Were Mr. Cowper's doctrine well founded, the court ought to grant a mandamus to the justices in the first instance, to put them to a return: but this is by no means the case; for the court must have probable ground laid before them, to shew that the place is a vill, or they will not interpose: and it is laid down [a] in *Strange*, that it is a good return to a mandamus, that a place is not, or ever was, reputed to be a vill.

Willes and Ashurst, Justices, concurring,
Rule discharged with costs.

[a] Dominus Rex v. the Inhabitants of Welbeck in Nottinghamshire, M. 14 G. 2. 2 Str. 1143.

Vide Rex v. Justices of Peterborough, H. 23 G. 3. 1783. Post. and Rex v. Inhabitants of Eyford, H. 25 G. 3. 1785. Post.

1782.

REX v. Jus-
TICES of
BEDFORD-
SHIRE.

1782.

Wednesday,
April. 24.

Order of justices, removed by certiorari in due time, may be quashed for objections upon the face of it, without a previous appeal to the sessions. The justices must adjudge a bastard to have been born in the parish to be charged by their order.

Rex v. Stanley.

TWO justices of the *West Riding* of the county of *York*, by an order dated the 29th of *May*, 1781, adjudge *Thomas Stanley* of *Workshop*, in the county of *Nottingham*, to be the reputed father of a bastard child, begotten upon *Ann Storey* of *Anston*, in the said *West Riding*; "which said child is now become chargeable, &c. and is likely so to continue," and then proceed to order maintenance, &c.

This order was served upon the defendant on the 31st of *June*. The next sessions were at *Midsummer* on the 18th of *July*. Upon an appeal to this order, at the *Michaelmas* sessions, holden by adjournment, on the 10th of *October*, that court dismissed the appeal, upon the ground of it's not having been made at the sessions next after the service of the order.

In the ensuing *Michaelmas* term a certiorari issued, directed to the keepers of the peace, and justices for the said *West Riding*, to remove all orders upon this subject made by the said justices. Upon the return of these orders, a rule was obtained to shew cause why the order of sessions, made on the 10th of *October* 1781, should not be quashed.

Chambre objected, that the defendant could not under this rule go into the original order, the order of sessions, which alone was moved to be quashed, having only dismissed the appeal and not confirmed the original order.

Buller, J. Though there may be a slight impropriety in the form, if in effect the order of sessions confirms the original order, the motion to quash the order of sessions is well enough.

Chambre now shewed cause against this rule; and insisted, that, till something to raise a contrary presumption was shewn, the intendment of the court was always in favour of the acts of every inferior jurisdiction: that the order of sessions in the present instance, not being objected to as defective in point of form, and not being special, but simply dismissing the appeal against the original order of two justices, could not be quashed; that there having, in point of law, been no appeal, there ought not to have been any order whatsoever made at the sessions; and that, if any objection was made to the original order, the certiorari ought to have been directed to the two justices to have returned it. And he contended, supposing *Mr. Wallace* should, as he had intimated, move to amend, by making it a rule to shew cause why the order of two justices,

justices, which had been appealed against, should not be quashed, or should move an original rule to quash *that order*, that in either way, and however shaped and pointed against such order, the application must now be out of time; as the stat. 13 G. 2. c. 18. [a] requires, that the "certiorari be applied for in six calendar months next after proceedings shall be had:" that it had been determined, in the case of [b] *Rex v. Baker*, that these six months are to be computed from the service of the order, which in the present instance was before the *Midsummer* sessions; and that the defendant, having neglected to appeal in time at the proper place, could not now come *per saltum*, and avail himself of an objection in this court.

Wallace, in support of the rule insisted, however this might be, had he now sought relief upon the merits, that he was at liberty to take any objection that arose upon the face of any legal instrument before the court: that, though the certiorari had not issued to the two justices to return their own order, but to the sessions, the two justices having returned their order to the sessions and it having been filed there, the certiorari had been properly directed to the place where that order in fact was: that the original order of the two justices had been returned: that it was here and no matter how: that the objection was open to him, and was fatal; it was, that there was no adjudication, that the child was born in the parish charged with its maintenance; nothing more being stated than that it was *chargeable to the parish and likely so to continue*: that the certiorari had been moved early [c] in *Michaelmas* term, long before the expiration of the six months; and that to whomsoever it was directed, the return contained and had brought before the court, every thing necessary to his purpose.

Chambre now insisted, that the notice of the motion for the certiorari was irregular, as it only stated, that application would be made to the court *after the expiration* of six days from the time of the service, without specifying any particular day; so that the justices and the party were deprived of their opportunity of shewing cause against its issuing, which the act intended they should have.

Wallace. It is no more uncertain than notice of motion on the first day of term *or so soon after*, as counsel can be heard.

Lord Mansfield. The notice is sufficient.

[a] s. 5.

[b] M. 27 Car. 2. 1675. 3 Keb. 551.

[c] Thursday, November 8.

1782.

REX v.
STANLEY.

Wallace

1782.

~
 REX v.
 STANLEY.

Wallace. That, as to the appeal being too late, no appeal was in any such case necessary at any time: that it was stated on the other side, that under the circumstances the court of Quarter Sessions had no jurisdiction, and even that it was no appeal: that this was an objection therefore upon the record, and not upon the merits.

The court seemed to think, that if the defendant had meant to take exceptions to the original order, he should have done it by appeal in due time to the sessions; as they could give relief as well upon the form as upon the merits: and that having declined the bringing of his case before the proper jurisdiction, in the first instance, he ought not now to be assisted by the court *per saltum*: but they gave time to look for authorities to justify such an interference.

A few days afterwards, *Chambre* admitted, that the order might be brought up by certiorari, without any appeal having been previously lodged at the sessions within time; and he stated the general rule as laid down in [a] 1 *Salk.* 147, that no certiorari shall be granted to remove orders of justices *before* the determination on appeal to the sessions, unless the time of appeal be expired; because it otherwise hinders the privilege of appealing: consequently that the court had a general authority to interfere; and that the present case, in which the defendant had declined an appeal within the period prescribed by law, was not within the exception. He also said, that this rule was farther explained in the [b] case of the borough of *Warwick*; which adjudged, that it was only in cases wherein the time of appeal was limited, and not where it was left open at any time, that this general authority of the court was abridged.

He added, that, as the certiorari appeared to have been moved in time, he should not press the court upon the form of the present rule, and without a reasonable prospect of success put the party to the expence of another.

Per Curiam,

The original order of adjudication of two justices must be quashed, and the order of sessions, dismissing the order of adjudication, affirmed.

[a] E. 1 Ann.

[b] M. 8 G. 2. 1 Str. 991.

Rex v. Hartley.

Wednesday,
May 1st.

UNDER the stat. 5 Ann. c. 14. for the better preservation of the game, the defendant was convicted for keeping and using a grey-hound to kill and destroy the game.

This conviction, upon the information of *John Bottomley* of the parish of *Hildwick*, in the *West Riding* of the county of *York*, labourer, before *Johnson Atkinson Busfield*, Esq. one of the justices, &c. stated, that *John Hartley* of the parish of *Thornton*, in the *West Riding* of the county of *York*, "did at the parish of *Thornton* aforesaid, within the *West Riding* aforesaid, within three months now last past, viz. &c. keep and use a certain dog, called a greyhound, to kill and destroy the game, &c."

And the conviction farther stated, that on the 24th day, &c. &c. one credible witness, to wit, *John Foulds* of the parish of *Carleton*, in the *West Riding* aforesaid, yeoman, cometh before, &c. and being then and there sworn, &c. deposeth, &c. in the presence of the said *John Hartley*, that "within three months next before information was made before me the said justice, by the said *John Bottomley* as aforesaid, to wit, on the 20th day of *September* aforesaid, in the 21st year aforesaid, the said *John Hartley* at the parish of *Thornton* aforesaid, in the *West Riding* aforesaid, being a person not then having lands, &c. &c. did keep and use a certain dog, called a greyhound, to kill and destroy the game: whereupon all and singular the matters, things and evidences abovementioned being fully heard and understood by the said *John Hartley*, &c. &c. and for as much as the said *John Hartley* doth not offer, alledge, or say any thing, or produce or offer any evidence in answer to the said information, evidence, matters, things and premises, or any of them charged on him as aforesaid, it manifestly appears to me, the said justice, that the said *John Hartley* is guilty of the premises in manner and form aforesaid above laid to his charge. Wherefore I the said justice, upon the oath, &c. do adjudge that the said *John Hartley*, on the 20th day of *September* aforesaid, in the 21st year aforesaid, at the parish of *Thornton* aforesaid, in the *West Riding* aforesaid, did keep and use a certain dog, called a greyhound, to kill and destroy the game, and that the said *John Hartley* had not then any lands, &c. And thereupon I the said justice, &c. do convict, &c.

Keeping dogs, &c. of the kinds enumerated, is, as well as using them, an offence against the game laws; and evidence *prima facie* of the purpose, for which they are kept. To say a dog, called a greyhound, is a sufficient averment of his being a greyhound.

J. A. BUSFIELD.

A a

On

1782.

REX
versus
HARTLEY.

On a rule to shew cause why this conviction should not be quashed, *Chambre* took two objections: 1. That it was not fully and sufficiently stated, that there had been an using of the greyhound, *i. e.* how and in what manner, and for what purpose. 2. That it was not expressly and positively averred, that he had kept and used a greyhound at all. He contended, that it was an established rule in convictions, that every material fact should be directly averred, and the evidence particularly stated: that in the present instance the manner of using, or purpose for which used, was so far from being particularly set out, that the conviction had only at most pursued the language of the act, *viz.* that the greyhound was kept "to kill and destroy the game:" that this was not sufficient, and that it was necessary to set out the evidence at large, he relied upon two authorities: 1. The case of [a] the *King v. Killet*, Clerk; which was a conviction of a clergyman under stat. 19 Geo. 2. [b] for neglecting to read the act against profane cursing and swearing: that in this conviction the information fully charged the offence, specifying that the defendant was parson of the parish, his officiating as such, his neglecting to read, &c. and that the same, as set forth, was duly proved; but that the court held, that it ought to have appeared to them, from the nature of the evidence specially set forth, that the defendant was guilty: and that the conviction was accordingly quashed. That in the other case [c], the *King v. Sparling*, which was a conviction under the same stat. [d] for profanely cursing and swearing, the conviction set forth the evidence to be, that the defendant profanely swore fifty four oaths and one hundred and sixty curses, &c. but the court held, that it could not in that form be supported, "the oaths and curses not being set forth: for that what is a profane oath or curse is matter of law, and ought not to be left to the judgment of the witness." That here the evidence is only, that the defendant kept a greyhound for killing the game: that therefore the witness here in like manner takes upon himself to swear to the law, and to judge what is game: and that he ought to have specified what the defendant did, or what game he destroyed; the particular act done, or the species of

[a] E. 7 G. 3. 1767. 4 Burr. 2063.

[b] c. 21. s. 13.

[c] H. 8 G. 1. Str. 497.

[d] s. 1.

animal

animal meant to be destroyed; as by so doing he would have supplied materials to enable those to form a judgment, whom the law considers competent to judge.

2. That it is not expressly and positively averred, that the defendant had kept and used a greyhound at all; but only that he kept and used a certain dog *called* a greyhound: that it might be called so, and yet be another kind of dog: that it might partake even of the nature of a greyhound; but that the act [a] clearly describes one particular species of dogs: that it might be an *Italian* greyhound, and unfit for the purposes prohibited by the act: and that it had been adjudged, that keeping a hound, though for the destruction of the game, could not be punished under this statute [b].

Wilson. J. in support of the conviction insisted, that the reason of the thing by no means justified the authorities that had been cited; and therefore that in a formal objection, where all the authorities were not uniform, the court would not, if not satisfied upon principle, avoid an act of a magistrate, which was not impeached upon the merits; especially as by so doing they would inevitably subject him to an action, a distress having been taken under the authority of this conviction: that where an act describes an offence, there seems to be no method so accurate and so little exceptionable as to follow the words of the legislature; neither in the present case, in which the penalty was the same whatever the sort of game might be, could any objection arise [c] from the inability of the magistrate under a general charge, to proportion the punishment to the particular nature of the offence: that there was but one species of game that a greyhound could kill; and that independent of the use, the keeping only for these purposes, of any dog prohibited by the statute, was sufficient to constitute the offence; for the statute says in the disjunctive, keep *or* use; and that, unless from the particular circumstances attending the dog, or other proofs adduced, the contrary could be shewn by the defendant, the law would infer that such dog was kept for such pur-

[a] The words of the act are: if any person shall, &c. keep *or* use any greyhound, setting dogs, hayes, lurchers, tunnels, or any other engines to kill and destroy the game, &c. 4. 4.

[b] H. 13 G. 2. *Hooker v. Wilks*, 2 Str. 1126.

[c] Vide *Rex v. Chapman*, E. 28 G. 2. 1755. Sayer 203.

1782.

REX
versus
HARTLEY.

1782.

Rex
versus
HARTLEY.

poses: that in the case of [a] the *King v. Piler*, it was holden upon this statute, that, as it ran in the disjunctive, the bare keeping of a lurcher is an offence within it; that the keeping of any of the things enumerated by the legislature, was therefore of itself an offence: that things indeed, which were only constructively included in the act, as a gun under the word "engines," must be expressly shewn upon the face of the proceedings to have been kept for the purpose of destroying the game; because a gun may be used for other purposes, as the protection of a man's house: that to this last doctrine, which was recognized in the case of [b] the *King v. Gardner*, it was added by the court, that "a gun differs from nets and dogs, which can only be kept for an ill purpose:" and that the present case being that of one of the instances enumerated, nothing more was necessary to be set out.

Chambre in reply, urged, that the cases cited against him had all gone upon the form of the adjudication; but that his objections went to the state of the evidence; that it was true, that it had been said in the *King v. Gardner*, that the purpose for which dogs were used, need not be set out; but that was not the point of the case: that the question there was, whether it was necessary to set out the purposes for which a gun was used: that the court held, it was, because a gun might be used for other purposes, as the protection of a house: and that the principle therefore of this decision supported his argument; for that dogs are more commonly kept for this very purpose, the protection of houses, than guns are.

Lord Mansfield. Convictions must certainly be precise, that the court may see whether the offence committed falls within the jurisdiction of the magistrate; and, whatever the consequences are, they must be quashed if not so. In this act there are two offences described; a keeping and an using; and the legislature mean, that there may be a keeping to destroy, &c. which is not of necessity to be proved by an using for that purpose. If it were so, it would be tautologous; for such evidence would be a proving of the other offence. The keeping therefore of a thing prohibited being an offence under the act, it is necessarily *prima facie* evidence of a keeping for the purpose prohibited; and it is incumbent up-

[a] H. 8 G. 1. Str. 496.

[b] Tr. 11 G. 2. 2 Str. 1098.

on the defendant to shew that it is kept for another purpose, as that in the present case, it is a house dog, a favourite dog, or a particular species of greyhound. The description cannot be more precise, unless some particular instance of using is shewn; which, if keeping of itself constitutes an offence, cannot be necessary.

As to the other objection, that the averment in this conviction is defective, in stating only that this was a dog *called* a greyhound, I think it positive enough. It must mean the dog of that species, generally known in this country.

Willes, J. The case of the *King v. Gardner* is in point, and must govern this. There is hardly another use to which this species of dog can be applied.

Ashburst, J. There is no doubt but that, under the common acceptation of the words used in the conviction, this is a sufficiently apt description of a greyhound: and it is not necessary in convictions to adhere to the letter.

Buller, J. concurring.

Rule discharged and conviction affirmed.

Vide the case of *Rex v. Thompson*, Tr. 27 G. 3. 1787. *Durnford and East*.

Rex v. Inhabitants of Bagworth.

Wednesday
May 1st.

BY an order of two justices of the county of *Leicester*, the form of which was as follows:—

“Whereas, &c. we, the said justices, upon examination of the premises upon oath and other circumstances, do adjudge the same to be true, and also do adjudge the place of the last legal settlement of the said *Sarah Ward* is in the said parish of *Ratby*, &c.”

The said justices remove *Sarah Ward* from the parish of *Bagworth* in the county of *Leicester* to the parish of *Ratby* in the same county. The sessions on appeal adjudged the settlement to be in *Bagworth*, quashed the order, and stated the following case:

That about nine weeks before old *Michaelmas* 1780, the pauper was hired by *William Hunt* of *Ratby*, for one week at two shillings and sixpence per week wages, and continued to live in that

Service under a hiring for a year will connect with similar preceding services under any number of hirings from week to week. An order of removal need not state an examination or summons of the pauper.

1782.

REX
versus
Inhabitants
of BAO-
WORTH.

Settlement at
Ratby.

that service in the said *William Hunt's* house at *Ratby* by the week till old *Michaelmas*, and received her wages every week. That during that time she considered herself at liberty to have quitted her service at the end of any one week, and to have hired herself to any other person. That at said old *Michaelmas* 1780, she was hired for a year from that time, and that she served till about a fortnight before the following old *Michaelmas*; when, being with child, she was desirous to conceal the knowledge of it from her master, and applied to her master to leave her service; and they parted by consent, and he paid her her wages, up to that time. That she was employed in the same manner during the time she served by the week, as under the hiring after *Michaelmas*.

Dayrell shewed cause in support of the order of sessions; and contended that, though the old rule, which was universally acknowledged to be the true as well as the most political construction of the act of parliament, *i. e.* that there must be not only an entire service for a year, but that such service must be under one entire hiring also, to gain a settlement, had by a long series of later authorities been overturned, the court ought not to extend a principle they did not approve, beyond the line of any former decision: that in every case which existed, in which a hiring and service for a broken period of time had been holden to connect with a service under a hiring for an entire year, such broken period had always been a considerable portion of time and in no instance less than a quarter of a year: that the act in its very terms [a] requires *a continuing and abiding* in the service: that, if the court were to hold, that these words were satisfied by a hiring for a week, they must also by a hiring for a day; and it would consequently be in the power of any master in twenty-four hours to settle in his parish any day-labourer, who had worked with him for twelve months: that the ceremony of a hiring for a year was in such case the only requisite: that, however, unlikely it might be to be frequently acted upon, the court would not think fit to lodge such a power [b] in the hands of masters: and that by the provisions of stat. 5 *Eliz.* [c] weekly

[a] 8 & 9 W. 3. c. 30. s. 4.

[b] Vide *Dennison, J.* in the case of *Rex v. the Inhabitants of Wrinton* otherwise *Wrington*. M. 22 G. 2. 1748. Burr. Settl. Cas. 280, and *Page, J.* in the case of *K. v. Aynhoe*. M. 1 G. 2. Bott. 292. and the court in the case inter the *Inhabitants of Dunsfold and Ridgwick*. M. 9 Ann. 2 Salk. 535.

[c] c. 4. s. 12.

servants are considered and put upon the same footing as day-labourers.

But in what view soever this might be considered by the court, he insisted, that the order itself could not in point of form be supported: that it did not appear to have been made upon proper and sufficient evidence: that it was made only upon examination of the premises: that an inquiry generally into the subject matter is not enough: that the pauper himself must be examined, and that that has been so holden in the case of [a] the King v. Wykes and Others.

Buller J. It cannot be necessary in all cases, that the pauper should be examined. In that of an infant of tender years it would be impossible. There is no such general rule: and as to the case cited, it was an information, and must therefore have gone on different grounds. The Justices probably [b] had refused to hear the pauper.

Dayrell. Still, as in the present case, the pauper is not stated to be an infant or under any such disability as would prevent her giving material evidence, it should appear that she had been first summoned, she ought to have had notice and to have been heard, before her removal; as she might have produced a certificate, or shewn other sufficient cause why she ought not to have been removed.

Buller J. To this objection an anonymous case in (c) *Comberbach* is in point. In that case *Holt, Ch. J.* says, "If it can be, 'tis fit it should be so, but not absolutely necessary."

Bearcroft and *Gally* were in support of the rule to quash this order: and *Bearcroft* insisted, that with respect to the last objection, even if there were not a case in point in his favour, nothing less than an authority directly in point against him, could, in this stage of the business, have induced the court to let it pre-

[a] Tr. 11 & 12 G. 2. 1738. Andr. 238.

[b] It was at the instance of a substantial person, the party removed, against Wykes, an inhabitant of the parish from whence the removal was made, and who took an examination without summoning the party and in which no complaint appeared, that the party was "likely to become chargeable," but only that he "had endeavoured to gain a settlement there contrary to law," and then sent the party to two other Justices to be removed. This the other justices did, under the examination taken by Wykes. The information went against them all; but against Wykes, as the case states, principally, not on account of the neglect of the summons, but because it was not laid in the complaint, "that the party was likely to become chargeable."

[c] E. 10 W. 3. Comb. 478.

1782.

REX
versus
Inhabitants
of BAG-
WORTH.

1782.

REX
versus
 Inhabitants
 of BAG-
 WORTH.

vail: and that, whatever the practice and the readiest rule in general for investigating the fact might be, a discretion was still to be exercised by the magistrate; and that the statute did not contain any peremptory direction to examine the pauper. That, as to the point made upon the facts stated, the words of *Parker Ch. J.* in the case of [a] the *King against the Inhabitants of Brightwell* applied exactly, and must govern the present case: and if there existed any decision in which the court had holden that a weekly service could not be coupled with a service by the year, there were other ingredients in the case; and it must have gone upon the principle, that the two services [b] were in a different character and not *ejusdem generis*: that therefore, in the instance of a day labourer or other workman, not an inmate, as these circumstances made the whole difference in point of law, the ill consequences pointed at could not possibly arise; but that the present was the case of a domestic, a menial servant, and it was expressly found, that the weekly service was performed, while the pauper "continued to live in her master's house," and that during this service "she was employed in the same manner as under the hiring after Michaelmas."

Willes J. (stopping Gally)

The question raised upon the merits is perfectly clear; and indeed seems to have been yielded at the bar. The pauper did not live in this family occasionally, or work under their directions merely as a day-labourer or charwoman, but constantly as a menial servant, and employed throughout in the same services: and a hiring for a year with a year's service in the whole, and that of a similar nature throughout, though it is made up of several hirings, (provided there be no discontinuance) gives a settlement. To the objection in point of form the case cited from *Comberbach* is decisive. And, if it were not, I should have no difficulty. We are to presume in favor of orders. An examination of the premises is an investigation of every fact relevant to the subject: this can-

[a] E. 1 G. 1. 1715. 1 Sef. Caf. 92. 10 Mod. 287. See also Caf. of Settl. 297. S. C.

[b] Vide *Rex v. the Inhabitants of Winton* otherwise *Wrinton*, M. 22 G. 2. 1748. Burr. Settl. Caf. 280. and *Rex v. Inhabitants of Grendon Underwood*, Tr. 23 G. 3. 1783. post. from whence the clear inference seems to be, that, though the capacity in which the servant acts, and the nature of the services performed, are not of the same denomination or genus, yet, if throughout the whole period of the two services, the pauper continues to be a menial servant and part of his master's family, such services will in point of law connect, and give a settlement.

not be but by means of the testimony of every necessary witness; and injustice cannot have been done; for, as this case went in course of appeal to the sessions, had there been an actual failure of this or any other necessary evidence, advantage would have been taken of it upon the case stated.

Buller, J. Here is a continuance in the service for a year: and it has been long settled, that, where the service extends throughout the year, you may couple any number of preceding hirings and services with a hiring for a year. The extent and duration of the several preceding services, where such services have been similar, have never been adjudged to vary the law; but there must be one entire hiring for a year. As to the other objection, independent of the authority, where it is doubtful whether an order is good or bad, the court will presume it good; and, as the settlement may be made out by other evidence, and cannot always by that of the pauper, it cannot be indispensably necessary that she should be examined. In the *King v. Honiton*, as reported by Mr. *Bott* p. 202, the order is set out at large, and is open [a] to the same objection; but none such was taken.

Ashburst, J. concurring.

Rule absolute.

Order of sessions quashed, and

Order of two justices affirmed.

Lord *Mansfield*, not having been in court during the whole of the argument, gave no opinion.

[a] The form of the order in that case was as follows: "And whereas upon due examination and inquiry made into the premises by us, the said Justices, it appears unto us, and we accordingly adjudge, &c."

Rex v. White and Eling, Overseers, &c.

Saturday,
May 4.

PEMBERTON A. had moved in arrest of judgment upon an indictment against the defendants, tried at *Bedford* before *Eyre, B.*, for not obeying an order of a justice of peace, made un-

authority, must be recited or at least referred to in an indictment for disobedience of such authority.

1782.

REX
versus
Inhabitants
of BAG-
WORTH.

1782.
 ~~~~~  
 REX  
 versus  
 WHITE and  
 ELING,  
 Overseers &c.

der stat. 19 G. 3., [a] directing the defendants, overseers of the parish of *St. John* in the town and county of *Bedford*, to reimburse a sum of money advanced by the overseers of the parish of *Meppershall* in the same county, to the family of a substitute in the militia of the said county, for an inhabitant of the parish of *St. John*; and which family at the date of the said order dwelt in the said parish of *Meppershall*.

The indictment at large stated, that on the 18th day of *July* 1781, *John Nesbitt*, Esq; one of the justices, &c. did issue an order under his hand and seal, in the words following. "County of *Bedford*. To the overseers of the parish of *St. John* in the town of *Bedford*. It appearing to me *John Nesbitt*, Esq; one of his majesty's justices of the peace in and for the said county, on oath, that the overseers of the parish of *Meppershall* in the said county have paid to the wife of *John Huffsiff*, for herself and three children, the sum of four shillings per week for eighty-three weeks, beginning on the 24th day of *June* in the year of our Lord 1773, and that the said *John Huffsiff* served during all that time, as a substitute in the *Bedford* militia for *John Clayton* of your said parish of *St. John*. These are therefore to order and direct you, the said overseers of the parish of *St. John* in the town of *Bedford*, to pay to the overseers of the parish of *Meppershall* in the said county the full sum of sixteen pounds and twelve shillings—Given under my hand and seal, *July* 18th 1781.

That on the said 18th day of *July* at the parish of *St. John* in the town of *Bedford* within the county of *Bedford* aforesaid, *John Bell*, then and now one of the overseers of the poor of the said parish of *Meppershall*, did produce and shew to *Thomas White* and *John Eling*, then and now overseers of the poor of the said parish of *St. John*, the said order of the said *John Nesbitt*, and did then and there demand of the said *Thomas White* and *John Eling* the sum of sixteen pounds and twelve shillings in the said order directed to be paid by the said overseers of the poor of the said parish of *St. John*, to the overseers of the poor of the said parish of *Meppershall*.

That the said *Thomas White* and *John Eling*, then and now being overseers of the poor of the said parish of *St. John*, on the day and year aforesaid, at the parish of *St. John* aforesaid, un-

[a] c. 72. s. 2.



lawfully, knowingly, and wilfully did refuse to pay to *William Lincoln* and the said *John Bell* or either of them, then and now overseers of the poor of the said parish of *Meppershall*, the said sum of sixteen pounds twelve shillings, and still do refuse to pay the same, in contempt, &c.

1782.  
 REX  
 versus  
 WHITE and  
 ELING,  
 Overseers &c.

To this indictment, upon which the defendants were found guilty, *Pemberton*, A. now took three objections; 1st, that it did not set out any order of maintenance previous to the order of reimbursement, without which first order there could be no legal foundation for the last. 2d, That the order was retrospective, being for the payment of a sum supposed to have accrued under an order of maintenance, made long before; whereas the act directs [a], that the order of reimbursement shall be made *at the same time* with the order of relief or maintenance; and that it was for a gross sum for eighty-three weeks; and, as inhabitants may change in that time, they ought not to be so charged, as this circumstance, or that of houses being uninhabited, would produce an inequality in the assessment. 3d, That it did not appear, upon the face of the indictment, either that the militia-man, for whom the substitute served, was ballotted, or that the substitute was sworn or enrolled.

*Murphy* and *Graham* shewed cause against the rule to arrest the judgment; and contended, in answer to the first objection, "that the order of maintenance was not set out," that the maxim, that there could be no intendment made to support an indictment, is not to be taken without some limitation; for there must be circumstances of inducement: that the order of maintenance is a judicial act, and that after verdict the court will presume it regularly made: that this was done in the case of [b] *The King v. Wright*; which was error upon a judgment on an indictment for suffering an escape of persons, *qui commissi fuerunt* by justices of the peace under stat. 8 H. 6. for a forcible entry: the error assigned was, that it is not expressed how the commitment was made, whether upon view of the justices or verdict

[a] The words of the act are: "In case any substitute, whose family may become chargeable, shall not serve for the parish where his family shall dwell, it shall be lawful for the justice of peace, who shall make any order for the relief of such family, *at the same time* to direct the overseers of the parish for which he shall serve, to reimburse the money so paid, to the overseer or overseers, who shall have advanced the same in pursuance of the order beforementioned."

[b] M. 23 Car. 2. 1 Vent. 169. Vide 3 Salk. 93. S. C.



1782.

REX  
versus  
WHITE and  
ELING,  
Overseers &c.

upon an indictment; so that it doth not appear, that they were legally committed, nothing of the proceedings being set forth, and it not being even said, *debito et legitimo modo commissi*. And the court held, that it being but inducement to the offence whereupon this indictment is, that it is well enough alledged, and after the verdict they must intend, "the commitment was legal." That the case of [a] *The King v. Pollard and Taylor* was very similar to the present; and that there in an indictment against an accessory, it was not holden necessary to aver that the principal could not be taken: that the present was not the case of a penal statute; and that here every thing material was set out.

2. As to the second objection, "that the order of reimbursement was not of the same date with the order of maintenance, but long after; and that it directed the payment of a gross sum," they insisted, that the words of the act must receive a reasonable construction: that, if taken strictly, it would in all cases be nonsense; but that in this particular case it was impossible that it could be so taken, as the order of maintenance was made [b] before the act passed: that the words "at the same time" must be construed adverbially and to mean "also" or "likewise": and that the sum directed was very reasonable for the length of time; and in a large parish was too small to become the object of a new assessment.

3. To the last objection, that it does not appear, that the militia-man himself was balloted, or that his substitute was sworn or enrolled, they urged; that it appeared, that the substitute served for his principal; and that out of this whatever else was called for by the objection arose as necessary inference; for that the substitute could not have served at all without having been sworn and enrolled; or in the character of substitute, had not his principal been previously balloted and drawn.

*Pemberton, A.* in support of the rule to arrest the judgment, insisted, 1st, that in criminal proceedings nothing is aided by a verdict: that they differ altogether from civil actions: that the statutes of jeofails do not extend to them, and did not even to the

[a] M. 11 G. 1724. 2 Ld. Raym. 1370.

[b] This act passed on the *thirtieth* of June 1779, and the order of maintenance must have been on or before the *twenty-fourth* of the same month: as the indictment states, that the weekly sum to be reimbursed began to be computed on that day.



cases of mandamus and quo warranto, till the statute of *Ann.* [a]: that the order of maintenance was not matter of inducement; but the very foundation, upon which the whole authority of the magistrate rested.

Lord Mansfield (stopping Pemberton,)

In indictments the crime, with which the defendant is charged, must appear with a scrupulous certainty: and here it is disobedience to the order of a justice. Now it must appear upon the face of the indictment that this was a legal order; for, if it is not so, disobedience to it is no crime. Then this is an order of reimbursement, which pre-supposes an order of maintenance. Such order necessarily must be; for, if the overseers had made the disbursement, of their own accord and without an order for that purpose, they could not legally be reimbursed. Such voluntary payment would not have entitled them to reclaim the sum advanced, because they are not authorized to judge of circumstances. Had the justice of peace recited the order of maintenance, 'tis admitted the indictment would have been good: and had he even in general terms referred to it, the court might perhaps [b] have presumed such order properly made. There would then have been some colour of authority for the jurisdiction exercised. But, so far from having recited it, he has not made the slightest reference to it. The indictment therefore cannot be supported.

Besides, the order of reimbursement is not at all connected with the order of maintenance, though the act requires, that they should both be made by the same justice *at the same time: i. e.* that whatever shall be paid shall be reimbursed: but this is at the distance of a year and for a gross sum.

*Willes, Ashurst, and Buller, Justices, concurring,*

Rule absolute, and  
Judgment arrested.

[a] 9 Ann. c. 20. s. 7.

[b] But it has been adjudged, that in an indictment where the jurisdiction exercised is founded upon a former order, a general reference to such order, without stating it, is not sufficient to support the indictment. *H. 20 Geo. 3. Rex v. Winship and Grunwell, overseers, &c. ante p. 72. Vide Rex v. Thomas Mytton, Esq; Tr. 25 G. 3. 1785. post.*

1782.

~

REX

versus

WHITE and

ELING,

Overseers &amp;c.



1782.

Saturday,  
May 4th.

A life-estate  
of less than  
150*l.* per  
annum, is  
not a quali-  
fication to  
kill game.

## Lowndes, Esquire, v. Lewis, Clerk.

**T**HIS was an action of debt on the stat. 5 *Ann.* [a] for the better preservation of the game, and the defendant pleaded the general issue. At the last assizes for the county of *Oxford*, the cause was tried before *Heath*, J.; and the plaintiff obtained a verdict for two penalties upon two counts, one for keeping, and the other for using, a greyhound, upon the ground that the defendant, who had a living of 100*l.* per annum, had not shewn an exemption under the stat. 22 and 23 *Car.* 2.; but with leave for the defendant to move to set aside the verdict, and enter it for the defendant.

And now upon such motion it appeared from the judge's report, that the points of law which arose out of the facts in proof at the trial, and which were meant to be submitted to the judgment of the court, were

1. Whether a person, having an estate for life of 100*l.* per annum, is qualified to kill game?
2. Whether a vicar, in respect of his church, has an estate of inheritance in him, or an estate for life only?

The first and most general question depended upon the words of the act, [b] which were, "that every person not having lands and tenements, or some other estate of inheritance *in his own or his wife's right*, of the clear yearly value of one hundred pounds per annum, or for term of life, or having lease or leases of ninety-nine years, or for any longer term, of the clear yearly value of one hundred and fifty pounds, is hereby declared to be a person, by the laws of this realm, not allowed to have or keep for himself or any other person, any greyhounds, &c.:" and the principal difficulty upon the argument seemed to be, whether the words "or for term of life," were properly referable to the first or last branches of the sentence, which created the exemption?

*Howorth*, *Bower* and *Clerke* shewed cause against the rule to enter the verdict for the defendant: and *Howorth* insisted, that, the interest of a parson *jure ecclesie* being no more than an estate for life, such property would not exempt him from the penalties of the stat. of 2 *Ann.*: that it was necessary that such an ecclesiastical estate

[a] c. 14. s. 4.  
[b] c. 25. s. 3.



should amount to 150*l. per annum*: that it was the obvious intention of the legislature, when they passed the stat. 22 and 23 Car. 2., to make a distinction between estates of inheritance, and estates for lives and years: but, supposing there were any doubt upon the words of the stat. of Car. 2., the statutes 1 Jac. and 7 Jac. being in *pari materia* must be taken as explanatory, and would remove the difficulty: that those statutes must have been consulted at the time, and that they make an express difference between the qualifications necessary to an owner of the inheritance and a mere tenant for life; and that the words [a] of the two acts were so clear and marked, and the consequences to be derived from them so plain, that they could not be farther elucidated by argument.

Bower insisted, that a due consideration of the several statutes and the general law upon this subject would not only fortify the construction above contended for; but would go a great way to shew, that no spiritual person, unless of such dignity as to have an estate of fee-simple in his church, could have any qualification to kill game: that such qualifications were merely *positivi juris*, and that no subject whatsoever is by common law so intitled: that strictly such title could only exist by grant from the crown: that the only statute which had ever given a positive right to any spiritual person to use these sports, was that of 13 R. 2. [b]: but that that statute, so far as it conferred this right, is repealed by the stat. 22 and 23 Car. 2.; which declares that they, who have not one hundred pounds *per annum*, in their own or their wife's right, are persons by the law of this realm not allowed, &c.: that a vicar

1782.

LOWNDES,  
Esquire,  
*versus*  
LEWIS,  
Clerk.

[a] The words of the first statute are: "all and every person and persons, which shall have or keep any greyhound, &c. except such person or persons, which shall be seised in their own right or in the right of their wives, of lands, tenements, or hereditaments of the clear yearly value of ten pounds by the year or more over and above all charges and reprises, of some estate of inheritance, or of lands, tenements, or hereditaments in his own right or in right of his wife for term of life or lives of the yearly value of thirty pounds over and above all charges and reprises, &c. shall be committed, &c." c. 27. f. 3.

The words of the other statute 7 Jac. are; "It shall be lawful to and for every freeholder which is or shall be seised in his own right, or in the right of his wife of lands, tenements, and hereditaments to the clear yearly value of forty pounds and more by the year over and above all charges and reprises, of some estate of inheritance, or of lands, tenements, and hereditaments, in his own right or in the right of his wife for term of life or lives of the yearly value of four-score pounds over and above all charges and reprises, &c." c. 11. f. 7, and vide stat. 1 Jac. c. 27. f. 6.

[b] c. 13.

or



1782.

LOWNDES,  
Esquire,  
versus  
LEWIS,  
Clerk.

or [a] rector has nothing in any such right, but holds only [b] *jure ecclesiæ*: that the inheritance is certainly [c] in abeyance: that he has not the mere writ of right, because he has not the intire fee [d]; but only the special remedy of *juris utrum* [e]: that a bishop indeed [f] had the fee in him; but that a rector had only an estate for life and that only in the right of his church; and, if he is intrusted with some of the remedies given to tenants in fee, it is for the benefit of the church only: that it was also observable upon this very right given to the clergy by the stat. of R. 2., that, though its provisions extended to all laymen, and even included artificers and labourers, "who had lands or tenements to the value of *forty shillings* by year," it enacts, that no priest "nor other clerk, if he be not advanced to the value of *ten pound* by year, shall have or keep from henceforth any greyhound, &c.:" that the insisting upon a qualification of ten pounds *per annum*, at that time and according to the then value of money, amounted in most instances to a prohibition: that it certainly must have been so meant; and that the reason was, that by the canon law [g] all clergymen were prohibited from using these sports.

That, as the statutes of the first and seventh of King James had been insisted upon as shewing that the legislature had uniformly made a distinction between estates of inheritance and estates for life, with respect to the annual value necessary to convey the right in question, the statute of [b] 3 Jac. which enabled any person, having lands of 100*l.* *per annum* in fee, or for life to seize and keep any gun used, &c. by any person not having, &c. might be cited on the other side to shew, that in some instances at least this distinction was not preserved, but that the owners of these

[a] There had been some mistake in the state of the question in this cause, the defendant being in point of fact *Rector* of Charlton in the county of Wilts.

[b] Litt. f. 644.

[c] Litt. f. 646.

[d] Vide Fitz. N. B. 49.

[e] Booth. 221.

[f] Litt. f. 645.

[g] Vide Blackst. Comm. 2. 413.

[b] The words of the act are; "If any person or persons, not having any manors, lands, tenements, or hereditaments of the yearly value of forty pounds, or not worth in goods or chattels the sum of two hundred pounds, shall use any gun, &c. that then any person, having lands, tenements, or hereditaments, of the clear yearly value of one hundred pounds in *fee-simple, fee-tail or for life*, in his own right, or in the right of his wife, may take from the person or possession of such *malefactor* or *malefactors*, and to his own use for ever keep, such guns, &c." c. 13. f. 5.

estates,



estates, though different in quantity of interest, were put exactly upon the same footing: and he insisted, that, in judging of this law and drawing consequences from it, the object of the legislature in making it ought to be had in view: that this act had not passed so much with a view of vesting any rights in these two classes or descriptions of men, as for the purpose of providing easier remedies to prevent the invasion by others of rights, which were by these classes of men considered as compleatly vested in them already; or at least that all legal pretence of claim in those, against whom it was levelled, had long been extinguished: that, if by these means it would become more hazardous to offend against the game laws, and consequently these sports, of which our ancestors were so tenacious, would be more effectually protected and exclusively enjoyed, it was within the very same rule of policy not to be too nice in drawing the line of qualification of those, who were empowered to seize the arms of *malefactors*; the strong term used in the act.

1782.

LOWNDES,  
Esquire,  
*versus*  
LEWIS,  
Clerk.

As to the words of the statute of *Car. 2.* "or for term of life," and that they relate to leasehold terms for years of 150*l. per annum*, and not inheritances of 100*l.*, he urged, that the abstract of Ld. Ch. Baron *Comyns*, who, when he speaks from himself, is a very high authority, confirmed the construction insisted upon by the plaintiff: in his Digest [a] he explains it thus: "By the stat. 22 and 23 *Car. 2. c. 25.* persons, not having an inheritance of their own or their wife's of 100*l. per annum*, or 150*l. per annum* in an estate for lives or years above 99, &c. shall not keep or use, &c.": and that the act is also stated in the same way in the case of [b] *Bennet v. Talbot*.

*Adair*, Serjeant, in support of the rule to enter the verdict for the defendant, insisted; that the words of the act, without calling in aid from any other quarter, clearly and sufficiently explained themselves: that it was impossible to throw back the words "or for term of life," to the clause respecting leases: that though it might be said that those words were awkwardly placed, from the circumstance of their having the qualifying sum, the 100*l.*, interposed between them and the estate of inheritance, yet it would be both grammar and sense to connect them with the first branch

[a] Vol. 4. Tit. Justices of Peace, p. 71.

[b] M. 8 W. 3. 1696. 5 Mod. 307. It appears either to have been so stated at the bar, or was perhaps the idea of the Reporter: It is not a point made in the case.



1782.

LOWNDES,  
Esquire,  
*versus*  
LEWIS,  
Clerk.

of the sentence, which describes the inheritance; whereas the next set of words are upon every principle of grammar plainly the introduction of a new branch of a sentence, and in construction detached from the former: that the words, "or having," in this clause answered and stood in opposition to the words, "not having," in the first and introductory clause: that this was therefore a new description in a new sentence, followed by a new value: and consequently that upon this ground a life estate of 100*l. per annum* was a legal qualification to kill game.

But, independent of grammatical niceties, he farther insisted, that in the present circumstances it was not reconcileable to principles to connect a clause respecting estates for life, with that, to which according to legal maxims it bore no relation: that things of the same nature and legal character must have been intended by the legislature to have been classed together: that the most marked distinction in the law is between estates of freehold, though of no higher a description than *pur auter vie*, and estates less than freehold, of whatever duration and extent: that upon this principle the act ought to be interpreted; and to read this clause conformably thereto, would in every sense be the most natural reading; for that the words "or having," not used in the preceding clause, which is the subject of contest, plainly denote, that, when introduced, a new subject is taken up; that that point is the true division of the sentence; and that the latter clause could not mean to comprehend or refer to either of the preceding descriptions.

He also contended, that the argument on the other side, that no spiritual preferment could give a qualification, and which was founded upon the words, "in his own or his wife's right," in the first branch of the sentence, do not apply, unless the words in contest, "or for term of life," are connected with and form a part of the same branch: but that the argument by its very aim referred itself there; and that, if it was properly so referable and not to the latter branch, it was the sole question between the parties; and 100*l. per annum* must be a qualification for a clergyman: that the estate of a parson being "to him and his successors," is but in other terms an estate in fee; that the word "successors," when applied to a parson in his politic capacity, is equivalent to the word "heirs," in his natural; and that this is as large an estate as any corporation has.

He



He observed, that Mr. *Howorth* had not ventured to comment upon, or to offer his construction of, this act of parliament, but had relied entirely upon the language of former acts in *pari materia*; which, as he argued, must have been in the contemplation of the legislature at the time the present act passed: and the Serjeant insisted, that the inference from thence was altogether in favour of the defendant; for, if those acts then lay before the legislature, if they were apprized of the distinctions which those acts made, and have omitted them, or even imperfectly expressed them, it must be presumed that they were purposely omitted; and that, in the construction of a restrictive and penal law, the party prosecuted is intitled to the advantage of either the slip or the intention.

That, with respect to the authorities, much stress ought not to be laid upon the abstract from *Comyns's Digest*: that an abstract materially differs from an opinion: that the first is at most a cursory view of a single passage or section: that the other is the result of a full consideration of the whole subject; that in either view he should oppose to it the authority of a writer, who appeared to have well weighed what he had delivered; and that it is said by Mr. Justice *Blackstone* in [a] his Commentaries, that "the qualifications for killing game are; 1. the having a *freehold* estate of 100*l. per annum*. 2. A leasehold for ninety-nine years of 150*l. per annum*, &c.": and that, as to the case cited, it was in an anonymous author, and no judicial opinion.

That the usual form of convictions upon the stat. of *Anne* shewed, that the act of *Car. 2.* was understood in the sense contended for by the defendant.

Lord *Mansfield*. No. It is quite otherwise. His Lordship then read the form as it is given in [b] *Burn*; and observed, that it appeared from thence, that, as the word "having" in the last member of the sentence is there omitted, the words "or for term of life," which form the preceding member, are necessarily connected with and carried over to the last member of the sentence: and consequently, according to the grammatical construction of this precedent, a tenant for life must have an estate to the amount of 150*l. per annum* to qualify him to kill game.

The clause, as it stands in the act, is not grammar. It is by some slip made nonsensical. The word "having" must be reject-

1782.

LOWNDES,  
Esquire,  
*versus*  
LEWIS,  
Clerk.

[a] Vol. 4. 175.

[b] Vol. 2. 328.



1782.

LOWNDES,  
Esquire,  
*per* *vs*  
LEWIS,  
Clerk.

ed; or the consequence is, that the having of a term must, as the act is worded, operate as a [a] disqualification: an impossible sense in any way of considering this statute. But leave out this word (and for the above reason it cannot be retained) and all is clear.

*Willes, J.* Construing this act, as it ought to be construed, by itself, and reading it without adverting to what might or might not pass at the time in the minds of the framers of it, it plainly gives, agreeable to the general understanding and practice, a qualification to all such as own a freehold of 100*l. per annum*. With no other title the clergy have always exercised this right, and ought not to be deprived of it. In the clause of the act, which is the subject of debate, there are two distinct branches of sentences, the sense of each of which is governed by the word "having." The break or pause is, where that word is taken up a second time; and there a new direction, a new sense and sentence, begin. This construction does no violence by rejecting any thing; and I cannot consent by another construction to extend the penalties of the act farther.

The forms of convictions, when once settled, whatever was the particular view upon which they were at first drawn, are copied and continued afterwards without thought or consideration. If, previous to the introduction of this form in any book of precedents, the particular case now before the court had ever been made the subject of discussion, the form must have been allowed to have weight: but no such action or prosecution was ever heard of before: on the contrary, the usage has been for persons in possession of an estate for life of 100*l. per annum*, constantly to exercise this privilege. It was this usage therefore, which spoke the sense of mankind upon the subject, and ought to prevail. Whatever may be the good sense of the thing, or the probable intention of the legislature, I think, that upon legal principles, if a penal act is defectively penned, it cannot be carried into execution. Without looking into the authorities cited, this is at present strongly the impression of my mind.

*Ashurst, J.* The act, as it stands, is nonsense. This subjects us to the necessity of adding or rejecting something. "Hav-

---

[a] For instance, "Every person not having some estate of inheritance, or for life, or having a lease for any term of years, is declared to be a person by the laws of this realm not allowed to keep greyhounds, &c."



ing," therefore must, in the last member of the clause, be rejected, or "not" must be added to it, to make the whole intelligible either way.

*Buller, J.* This case seems to me to admit of no doubt, when the question is considered with reference to former acts in *pari materia*; and if we must either reject, or add, or transpose words in this act, to obtain a clear and consistent meaning, under such circumstances we can do no other than resort to former statutes: and each of those cited in the reign of king *James*, not only require in the case of estates for life a higher qualification than in the case of inheritances, but even to a double and treble amount. But upon the act itself the construction must be, that estates for life are not equivalent to estates of inheritance, or the whole of the first clause is nugatory, and altogether rejected in effect; as the second, which is having an estate of freehold, would have included it. The passage in *Comyns*, the case in 5 *Mod.*, and the printed form of convictions, all strongly shew the general understanding upon the subject; and, added to the sense of the legislature in the acts *pari materia*, afford to my mind an unanswerable argument.

*Lord Mansfield.* We will think of it; and should we change our opinions, we will let you know. In the mean time let the Rule be discharged.

It was never mentioned again.

1782.

LOWNDES,  
Esquire,  
*versus*  
LEWIS,  
Clerk.



1782.

# Trinity Term

22 Geo. 3. 1782.

Friday  
June 7th.

Rann, Clerk, v. Pickin et al.

Payments in lieu of tithes, settled under a compromise between a parson and parish, and confirmed by act of parliament, are rateable to the poor.

**T**HE quarter-sessions for the county of the city of *Coventry* upon appeal confirmed a rate, whereby the plaintiff, as vicar of a parish in that city, was assessed to the poor for his payments, settled under an act of parliament by compromise with his parishioners, in lieu of tithes, &c.: and refused to state a special case. The plaintiff, refusing to pay the sum so assessed, was distrained upon: and this was an action of trespass brought by the plaintiff against the defendants, the justices and officers, for authorizing and taking this distress. The defendants pleaded the general issue, the cause was tried at the last assizes for the county of the city, and the jury found a special verdict, as follows:

That the said *Joseph Rann*, clerk, on, &c. hitherto hath been and still is vicar of the vicarage of the *Holy Trinity*, in the parish of the *Holy Trinity*, in the said city of *Coventry*, in the county of the said city.

And the jurors aforesaid, upon their oath aforesaid, further say, that the said *Thomas Pickin* on, &c. was Mayor of the said city of *Coventry*, and a justice of the peace of our Sovereign Lord the King, in and for the said city of *Coventry* and the county of the said city, and one of the quorum; and that *Samuel Vale* on, &c. was also a justice of the peace, &c. And that on, &c. the said *Samuel Johnson* was high constable within the said city of *Coventry*, and the said *John Whitwell*, and *Richard Mullis*, and each of them was an overseer of the poor of the said parish of the *Holy Trinity*, in the said city of *Coventry*.



That in and by a private act of parliament made in the year of our Lord 1558, and in the 4th and 5th years of the reign of the Lord and Lady *Philip* and *Mary*, late King and Queen of *Great Britain*, intituled "An acte for the payment of tith in the citie of *Coventrye*," reciting, that forasmuch as in the city of *Coventry* there had been, before the time of the schism, and the declining from the catholic faith and true religion of *Christ*, two notable benefices and vicarages, the one called the vicarage of *St. Michael*, and the other the vicarage of the *Trinity*, the right and title of the patronages whereof was now most lawfully descended and vested in the Queen's Majesty, the tithes profits and casualties of the which benefices, before the said schism, were sufficient and able to find two grave and learned incumbents and vicars, although the said tithes profits and casualties stood and depended only upon the devotion of the citizens and inhabitants of the same city: and now, since the said disordered schismatical time in the religion of *Christ*, the good will and devotion of the people was so much decayed, that the said benefices were not able conveniently to find any incumbent of any honest estimation and learning; insomuch that the greatest parish in the said city, called *Saint Michael's* in *Coventry*, had and did remain four years and a half without any incumbent and vicar, by reason the profits and emoluments of the same were so small, that no learned or apt priest would be content to accept or receive the same; and so was very like still to remain, if remedy were not ordained. And because there was no ordinary way, by the law or statutes of this realm at any time theretofore made or provided, to enforce the minds and devotions of the said inhabitants, to pay any other kind of tithes and duties to any of the said vicars, than they themselves should think meet, by reason thereof, it was very like that the patronages before remembered, should remain and be of no value or estimation, and that also the catholic and devout people inhabiting in the said city, should want and not have the sacraments of the church to them administered, according as it was meet for christian people to have; for reformation thereof it was enacted by the authority of that present parliament, that the citizens and inhabitants of the said city of *Coventry*, and suburbs of the same for the time being, should, yearly without fraud or covin for ever, pay their tithes to every of the vicars of the said two parishes before rehearsed, and their successors for the time being, after the rate order and portion hereafter following; (that is, to wit) of every ten shillings rent by year, of all and every house

1782.

RANN  
versus  
PICKIN.



1782.

~  
RANN  
versus  
PICKIN,

house and houses, shops, warehouses, cellars, and stables, and every of them, within the said city and liberties of the same, twelve pence. And every twenty shillings rent by year, of all and every such house or houses, shops, warehouses, cellars, and stables, and every of them, within the said city and liberties, two shillings; and so above the rent of twenty shillings by year, ascending from ten shillings to ten shillings according to the rate and portion aforesaid.

*Item*, That where any lease was or should be made of any dwelling house or houses, shops, warehouses, cellars, and stables or any of them by fraud or covin, reserving less rent than had been accustomed to be or was then paid, or that any such lease was or should be made without any rent reserved upon the same, by reason of any fine or income paid beforehand, or by any other fraud or covin, that then in every such case, the tenant or farmer, tenants or farmers thereof, should pay for his or their tithes of the same after the rate aforesaid, according to the quantity of such rent or rents as the same house or houses, shops, warehouses, cellars, stables, or any of them were last let for, without fraud or covin, before the making of such lease. *Item*, that every owner or owners inheritor or inheritors, of any dwelling house or houses, shops, warehouses, cellars, or stables, or any of them within the said city and liberties, inhabiting or occupying the same himself or themselves, should pay after such rate of tithe as was aforesaid, after the quantity of such yearly rent as the said houses should be rated at by such persons as the Lord Chancellor should appoint by commission for the same. *Item*, If any person and persons had taken or hereafter should take any mease or mansion place by lease, and the taker or takers thereof had, or their executors or assigns did or should inhabit in part thereof, and had within eight years last past before that order, or thereafter would or should, let out the residue of the same, that then in such case, the principal farmer or farmers, or first taker or takers thereof, his or their executors or assigns, should pay his or their tithes after the rate aforesaid, according to his or their quantity therein, and that his or their executors or assigns should pay his or their tithes after the rate aforesaid, according to the quantity of his or their rent by year; and that if any person or persons had or should take divers mansion houses, shops, warehouses, cellars or stables, in one lease, and did let or should let out one or more of the said houses, and did keep or should keep one or more in his own hands, and



and did inhabit the same, that then the said taker or takers or his or their executors or assigns should pay his or their tithes after the rate abovesaid, according to the quantity of the yearly rent of such mansion house or houses reserved in his or their hands, and that his assignee or assignees of the residue of the said mansion house or houses should pay his or their tithes according to the quantity of their yearly rent. *Item*, if such farmer or farmers, or his or their assigns, of any mansion house or houses, warehouses, shops, cellars or stables, had at any time within eight years last past, or should hereafter, let over all the said mansion house or houses contained in his or their lease, to one person, or to divers persons, that then the inhabitants, lessees or occupiers of them and every of them, should pay their tithes after the rate of such rents, as the said inhabitants, lessees or occupiers, and their assigns or assignees, had been or should be charged withal, without fraud or covin. *Item*, If any dwelling house within eight years last past, or thereafter, should be converted into a warehouse, storehouse, kilnhouse or malthouse, or such like; or if a warehouse, storehouse, kilnhouse or malthouse, or such like, within the said eight years, was, or thereafter should be, converted into a dwelling house, that then the occupier or occupiers thereof should pay tithes for the same after the rate above declared of the rents of mansion houses. *Item*, That where any person should demise any dyehouse, brewhouse, kilnhouse or malthouse, with implements convenient and necessary for dying, brewing or making or keeping of malt, reserving a rent upon the same, as well in respect of such implements, as in respect of such dyehouse, brewhouse, kilnhouse or malthouse, that then the tenants should pay their tithes, after such sort as was abovesaid, the third penny abated. *Item*, That when any mansion-house with a shop, stable, warehouse, timber-yard, trinter-yard or garden, or orchard, belonging to the same, or as parcel to the same, was or should be occupied together, that if the same be hereafter severed or divided, or at any time within eight years last past, had been severed or divided, that then the farmer or farmers, occupiers or occupier thereof, should pay such tithes as was abovesaid for such shop, stable, warehouse, timber-yard, trinter-yard or garden aforesaid, so severed or divided after the rate of their several rents thereupon reserved. *Item*, That the said citizens and inhabitants should pay their tithes quarterly (that is to say) at the feast of *Easter*, the nativity of Saint *John* the Baptist, the feast of Saint *Michael* the Archangel, and the

1782.

~

RANN

versus

PICKIN.



1782.

~

RANN  
versus  
PICKIN.

nativity of our Lord God, by even portions. *Item*, That every householder, paying ten shillings rent or above, should for himself or herself be discharged of their four offering days; but his wife, children, servant, or other of their family, taking their rights of the church at *Easter*, shall pay two-pence for their four offering days yearly. Provided always, and it was enacted by the authority aforesaid, that if any house or houses, which had been or hereafter should be let for ten shillings rent by year, or more, been or had at any time within eight years last past, or hereafter should be, divided and leased into small parcels or members, yielding less yearly rent than ten shillings by year, that then the owner or owners, if he or they dwell in any part of such house, or else the principal lessee or lessees, if the owner or owners do not dwell in some part of the same, should from thenceforth pay for his or their tithes after such rate of rent as the same house had been accustomed to be let for, before such division or dividing into parts and members; and the under-farmer and farmers, lessee and lessees, to be discharged of all tithes for such small parcels, parts, or members, rented at less yearly rent than ten shillings by year, without fraud or covin, paying two-pence a year, yearly for their four offering days. Provided always, and it was enacted by the authority aforesaid, that for such gardens as pertain not to any mansion house, and which any person or persons did hold or should hold in his or their hands for pleasure, or to his own use, that there the person so holding the same, should not by virtue of this act pay any tithe for the same: but if any person or persons, which did hold or should hold any such garden containing half an acre or more, did or should make any yearly profit thereof by way of sale, that then he or they should pay tithes for the same, after such rate of his rent as was therein first above specified. Provided also, that if any such gardens, then being of the quantity of half an acre or more, be thereafter by fraud or covin divided into any less quantity or quantities, then to pay tithes according to the rate aforesaid. And it was further enacted by the authority aforesaid, that if any variance, controversy, or strife, did or should thereafter rise in the said city for non-payment of any tithes, or if any variance or doubt arise upon the true knowledge or division of any rent or tithes, within the liberties of the said city, or of any extent or assessment thereof, so that by any colour or mean, any house or houses, or other things before mentioned within the said city, should escape without rating or assessment, or otherwise be



be discharged, or if any doubt arise upon any other thing contained within this bill or act, that then, upon complaint made by the party grieved to the mayor of the city of *Coventry* for the time being, the said mayor, by the advice of the council of the said city, should call the said parties before him, and make a final end in the same, with costs to be awarded at the discretion of the said mayor and his assistants, according to the intent and purpose of that present act; and, if the said mayor made not an end thereof within one month next after complaint to him made, or if any of the said parties found themselves grieved, that then the Lord Chancellor of *England* for the time being, upon complaint to him made, calling unto him the two Chief Justices for the time being, should make final order in the same cause or causes, as to him and them should seem meet, and should award such costs as to him and them should be thought convenient. Provided always, that if any person or persons take any tenement for a less rent than it had been accustomed to be let for, by reason of any great ruin, decay, burning, or such like occasions or misfortunes, that then such person or persons, his executors and assigns, should pay tithes only after the rate of the rent reserved in his or their lease, and none otherwise, as long as the same lease should endure.

That in and by a certain act of parliament, passed in the 19th year of the reign of our Sovereign lord the now King, intituled "An act for the better providing of a maintenance for the vicar of the parish of the *Holy Trinity* in the city of *Coventry*," reciting, That whereas in the city of *Coventry*, there were two parishes and parish churches, one whereof was the parish and vicarage of *Saint Michael*, and the other the parish and vicarage of the *Trinity*; and whereas the king's majesty in right of the crown of these realms was patron of the said vicarage of the *Trinity*, and the tithes and other vicarial profits and benefits did principally arise from rates or assessments made by virtue of an act passed in the fourth and fifth year of the reign of King *Philip* and Queen *Mary*, intituled, An act for the payment of tithes in the city of *Coventry*: and whereas in process of time, the rates, and assessments made under or by virtue of the said act, had been much diminished from their true value, and differences and suits had arisen and taken place between the vicar and the inhabitants, relative to the said rates and assessments: wherefore, in order to put an end to such controversies, and that an income might be provided in future, sufficient for the maintenance of the vicar of the said parish of the *Trinity*, to be in lieu of all tithes and

1782.

~

RANN

versus

PICKIN.



1782.

RANN

versus

PICKIN.

other ecclesiastical dues within those parts of the said parish, which lay within the said city of *Coventry*, and suburbs thereof, except such endowments, bequests and stipends, as had been theretofore, or should be thereafter bestowed upon the vicar of the said parish, and also except surplice fees, it was enacted; that the said act, passed in the fourth and fifth year of the reign of King *Philip* and Queen *Mary*, intitled An act for the payment of tithes in the city of *Coventry*, should so far as the same related to the parish and vicarage of the *Trinity* in the city of *Coventry* and the suburbs thereof be, and the same was thereby declared to be, repealed. And by the said last mentioned act of parliament it was further enacted, that, within thirty days after the passing of that act, and in *Easter* week in every year afterwards, one rate or assessment should be made, laid and assessed by assessors, to be named and appointed as therein after was mentioned, to be in lieu of tithes, and all rates, assessments, or other ecclesiastical dues and payments, claimed by the vicar of the said parish or vicarage, under or by virtue of the said act passed in the fourth and fifth year of the reign of King *Philip* and Queen *Mary* (*Easter* offerings and surplice fees excepted) upon all and every person and persons, who did or should inhabit, hold or occupy any house, garden ground, or orchard for sale, shop, warehouse, dyehouse, malthouse, brewhouse, kilnhouse, or workhouse, yard, barn, stable, shed, cellar, vault, or other tenement, by whatsoever name or description the same might be known, of the yearly value of twenty shillings or upwards, within those parts of the said parish of the *Trinity*, which lay within the said city of *Coventry* and suburbs thereof: which rate or assessment should be collected quarterly, and made and laid to raise one shilling in the pound *per annum*, and no more, upon all and every such premises respectively, according to the yearly value thereof. Provided, that no such rate or assessment should be laid upon any dwelling house only, the annual rent or value whereof should be under six pounds.

That the said tithes, so settled by the said act of parliament of the fourth and fifth of King *Philip* and Queen *Mary*, to be paid to the vicar of the parish of the *Trinity* in the said city of *Coventry* as beforementioned, were never rated to the poors rate for the said parish.

That by a rate or assessment for the necessary relief of the poor of the said parish of the *Holy Trinity*, on the third day of *November*, in the year of our Lord one thousand seven hundred and eighty, the said *Joseph Rann*, clerk, as vicar of the said parish, was rated for



for his tithes in the said parish, due and payable by virtue of the said act, at the sum of 7*l*. 10*s*.; and that such rate or assessment was afterwards at the next general quarter sessions of the peace, held in and for the said city of *Coventry*, on the eight day of *January* in the year of our Lord one thousand seven hundred and eighty-one, upon the appeal of him the said *Joseph Rann* therefrom, duly confirmed.

1782.

RANN  
versus  
PICKIN.

That the said *Thomas Pickin* and *Samuel Vale*, so being such justices of the peace, and of the quorum as aforesaid, on, &c. duly summoned the said *Joseph Rann* to appear before them, &c.

That the said *Joseph Rann* did not appear according to the exigence of the said summons; and that thereupon the said *Thomas Pickin* and *Samuel Vale*, so being such justices of the peace, and of the quorum as aforesaid, on, &c. duly issued their warrant, &c. directed to the churchwardens and overseers of the said parish to make distress of the goods and chattels of the said *Joseph Rann*, &c.

That *John Whitwell* and *Richard Mullis*, as overseers as aforesaid, and the said *Samuel Johnson*, as constable and their assistant, by virtue of, and in obedience to, and executing that warrant, on, &c. seized and took the goods and chattels of the said *Joseph Rann*, &c. But, whether upon the whole matter aforesaid, the said *Thomas Pickin*, &c. are guilty of the trespass, &c. or not, the jurors, &c. pray the advice and consideration of the court here, and if upon the whole of the matter above, &c. it shall seem to the court here, that the said *Thomas Pickin*, &c. are guilty, &c. then the said jurors upon their said oath say, that the said *Thomas Pickin*, &c. are guilty of the trespass, &c. and they assess the damage of the said *Joseph Rann*, &c. over and above his costs and charges, by him laid out about his suit in this behalf, to one shilling, and for those costs and charges to forty shillings; but if upon the said whole matter above, &c. it shall seem to the court here, that the said *Thomas Pickin*, &c. are not guilty of the trespass, &c. then the said jurors upon their said oath say, that the said *Thomas Pickin*, &c. are not guilty of the trespass within complained of: Therefore, &c.

*Balguy* for the plaintiff insisted, that, a case having come a few years since from another parish in the same city, which appeared to him to be exactly the same as the present, it was incumbent on the other side to distinguish them: that the principle of that determination,



1782.

RANN  
versus  
PICKIN.

determination, [a] the *King v. Toms*, was; that the fund which was originally established for the maintenance of the incumbents of these livings, not having been at first subjected to parochial taxation, that which has now been substituted, ought not, without an express agreement, to be received in any other way, or subject to any other burthens.

*Dayrell* for the defendant insisted, that, whatever else might have been said by the court, Lord *Mansfield* had then said, that the words in the clause of the act respecting the other parish, which gave an option to the parish officers to raise 280*l.* annually, and pay it, clear of all *parochial*, &c. taxes and charges, to the vicar in full satisfaction of all his claims, was decisive; as it was clear from thence, that it must have been the intent both of the parties and the legislature, that he should have at least that sum, free from every possible deduction: that this was the ground of the determination in that case; but that the present did not afford any such argument, as this act did not contain any such provision.

Taking the case therefore independent of any contract between the parties sanctioned by the legislature, and as it must stand under the general law, he insisted, that there could be no doubt but that tithes were a proper subject of the poor's rate; and that they were expressly declared to be so by stat. [b] 43 *Eliz.*: that, as to the supposed principle of the decision of the *King v. Toms*, it must have been a mistake; as the new statute enacts, that the assessments thereby directed shall be *in lieu and full discharge of all Easter offerings, tithes and other ecclesiastical demands whatsoever*: and consequently that tithes must formerly have been part of the maintenance of vicars in the parishes of *Coventry*: that, should it be contended that this was now not so much a payment in lieu of tithes as in the nature of rent, he insisted that there was no idea of rent throughout the act: that tithes, whether by prescription, custom or act of parliament, are equally rateable to the poor: that, if they are tithes, it is not the manner in which they are made payable, that can make any difference: and that, in the case of [c] *Lowndes v. Horne* and Others, it was settled, that the nature and qualities of this property are in no degree affected by the mode in which it is received, and that a sum of money, paid by the owners of land

[a] E. 20 G. 3. 1780. Dougl. 386.

[b] c. 2. s. 1.

[c] H. 19 G. 3. 1779. 2 Blackst. Rep. 1252.



under an inclosing act in lieu of tithes, is liable to the poors rate, and is not a rent.

That whether tithes are payable in kind, or, as these are, by way of modus, it is the same thing: that it has been decided in the case of [a] the *King v. the Inhabitants of Lambeth*; that, in the case of a modus or composition, the parson is chargeable as occupier, and that the receipt of a sum of money in lieu of tithe, is in law a receipt of the tithe: that it has been adjudged in [b] Dr. *Graunt's* case, that by *custom* tithes are payable for houses: that of course there could here, under the *act of parliament*, be no difficulty upon that subject: and that in the case of [c] the *King v. Skingle* tithes are adjudged to be a tenement, and as such rateable.

*Balguy* in reply contended, that the distinction between this case and that of *Toms* was only, that in the present there is no sum expressly stipulated between the parties, and from which a constructive exemption, from what might in general be a strict legal claim, could arise on behalf of the vicar; but that here he was clearly exempt by the plain construction and nature of this contract, which annihilated every possible claim, that either might have had upon the other, such only excepted as appeared in express terms upon the face of the treaty: that the court had certainly said in *Toms's* case, that this was not so much a payment in lieu of tithe as in the nature of rent: and that to call it tithe was, upon the letter of the act, to assume the whole of the argument.

*Buller, J.* What say you to the preamble of the act? [d]

The court took time to consider; and the next day *Balguy* (and *Rous* who had attended the Committee of the House of Commons upon this bill) stated to the court; that in the progress of the act, the parties came to an agreement, that the plaintiff should have one shilling in the pound; but, as it did not appear there was any agreement that the produce of this assessment should be restricted to any certain sum, as in the other case, and as there was nothing suggested on either side as to exemption from the poor rate, the court paid little attention to this fact.

And now Lord *Mansfield* delivered the judgment of the court.

This act does not enable the parish to pay the vicar a gross sum, clear of all deductions, whenever the tithes, settled by the act, exceed a given amount; as was the case in the *King v. Toms*. There

1782.

RANN  
versus  
PICKIN.Saturday,  
June 8th.

[a] Tr. 8 G. 1. 1 Str. 525.

[b] Mich. 11 Jac. 1. 11 Co. 16.

[c] Tr. 4 G. 1. 1 Str. 100.

[d] 4 &amp; 5 Ph. &amp; M.



1782.

RANN  
versus  
PICKIN.

is therefore a distinction between the two acts: here there is no exemption from parochial burthens, how small soever the sum.

Postea to defendant.

### Rex v. Inhabitants of Hensingham.

Saturday,  
June 15th.

A service entered upon in a second year, while in a capacity to acquire a settlement, though without any new contract, and referable only to a former contract entered into when not in a capacity to acquire a settlement, will, if completed, give a settlement, even though such capacity was unknown to both parties at the time the second service or new contract was entered into.

In the first instance it is enough to shew a woman's settlement before marriage: and, if it were not, to know only that her husband was born in Yorkshire, is information of a nature too loose and general, to make an inquiry after him there necessary.

TWO Justices by an order remove *Bridget Gibson* and her child from the township of *Whitehaven* in the parish of *Saint Bees* in the county of *Cumberland* to the township of *Hensingham* in the same parish and county. The sessions on appeal confirm the order, and state the following case:

That the pauper, *Bridget Gibson*, widow, on the 6th January 1772, married *Andrew Camble* at *Whitehaven*, who shortly afterwards went on a voyage to sea; and at *Martinmas* following she was brought-to-bed of a daughter by her said husband.

On the 24th of February then next, the pauper *Bridget*, her said husband and child being living, was hired by Mrs. *Benn*, wife of *Anthony Benn*, Esquire, of *Hensingham*, to nurse her child for two shillings and six-pence per week wages, so long as her child should remain at the breast: that she nursed Mrs. *Benn's* child and continued in her service at *Hensingham* on said contract and wages till *Whitsuntide* 1774, during which time her child by the said *Andrew Camble* died.

That at *Whitsuntide* 1774, the said *Andrew Camble* being then also living and being at *Liverpool*, Mrs. *Benn* went to the pauper, and said, "*Bridget*, I'll give you four guineas a-year, which is more wages than I ever before gave a nursery-maid:" and the pauper agreed thereto, and continued in consequence of this contract with Mrs. *Benn* till *Whitsuntide* 1775; but about nine weeks before the expiration of that year, by reason of sickness in some of Mrs. *Benn's* family at *Hensingham*, Mrs. *Benn's* family and also the pauper removed to *Whitehaven*, and stayed there till within ten days of the expiration of the term; and then the family and the pauper returned to *Hensingham*, and the pauper there continued till *Whitsuntide* 1775: and the pauper without any other contract or conversation whatsoever continued another year at Mrs. *Benn's*; (to wit) till *Whitsuntide* 1776: but the pauper says, she considered herself at liberty at any time, if her husband should return.

In August 1775 the pauper received a letter from an inn-keeper at *Liverpool* informing her of her husband's death on the mid-



dle passage from *Guinea*, which letter is burnt; and on receipt of said letter, her master, at her request, wrote to his friend at *Liverpool* a letter and direction in these words:

Dear Sir,

At the request of *Bridget Campbell*, a servant in my house, I take the liberty of writing to you concerning some wages due to her late husband, *Andrew Campbell*, a seaman, who belonged to the ship, *Violet*, in the *African* trade; which ship arrived at *Liverpool* on the first instant, and brought an account, that *Campbell* died on the tenth of *April* last: his wages were thirty shillings a month, but his wife does not know how many months are due, or whether he had taken up any part of them or not.

If you can make it convenient to inquire into this matter I shall be much obliged to you for your assistance, and will take care to have the necessary requisites performed, for enabling you to receive the money.

I am, &c.

ANTONIO BENN.

*Hensingham*,  
7th September 1775.

To Mr. *Allan Pearson*, Merchant,  
*Liverpool*.

And she received her husband's wages in pursuance of the said letter; but his death, or the time it happened, does not otherwise appear.

On the 2d of *December* 1777 the pauper was married to her late husband, *William Gibson*, who in his life-time told the pauper, he was born in *Yorkshire*; but, where his settlement was, he knew not: that the pauper had by the said *William Gibson*, her son *William Gibson*, the other pauper, lawfully born at *Whitehaven*.

It appearing to this court, that the place of her last husband's settlement is not known, and that the pauper hath gained a settlement in *Hensingham* by a years service with Mr. *Benn*, subsequent to the death of *Campbell*, her first husband, the sessions doth therefore confirm the order, subject to the opinion of the honourable court of King's Bench.

*Wallace* shewed cause in support of these orders; and insisted, that a new service having commenced at *Whitsuntide* 1775, a period at which the pauper was in a capacity to acquire a settlement by

E e

hiring

1782:

REX

versus

Inhabitants of  
HENNING-  
HAM.

Settlement in  
*Hensingham*.



1782.

~

REX

versus

Inhabitants of

HENSING-

HAM.

hiring and service, her first husband and child being then dead, she had, by compleating that service at *Hensingham*, acquired a settlement there: that, upon proof of this settlement gained by her in her own right, it became incumbent upon that parish to shew some derivative or subsequent settlement: that, till such proof was made, the settlement that appeared must be taken to be her legal settlement; and consequently, that she had properly been adjudged an inhabitant of *Hensingham*.

*Wilson, J.*, in support of the rule to quash these orders, stated this to be a new case: that the question was, whether the pauper's continuance throughout a compleat new year without any new agreement, at a time when she was capable, though she did not then know it, of making such contract as would in point of law give a settlement, in a service, the original contract respecting which had been made while she was under an incapacity of acquiring a settlement by such contract, could legally be so connected with such former contract, as by a reference to it to be considered a contract at all? And he contended, that, as far as it was a contract, which could be by relation only, it referred itself to an original, from whence it was impossible that a settlement could be derived: that, if it must necessarily be taken as a branch of the contract of 1775, it could not have any other fruit than such as would spring from thence: and that subsequent events, not in the contemplation of either of the parties to this constructive contract at the time, and which if then known, might have prevented the mistress from suffering a continuance of the service, ought not to establish rights and produce consequences, as the fruit of such contract; when no such rights or consequences could possibly exist in the minds of either of the parties at the time the contract was entered into.

But the court intimating an opinion that this might very well be considered as a new and independent contract; and that, in favour of settlements, it would be enough, if at the time of making the contract the party was, in point of fact, whatever might be in contemplation, capable [a] of acquiring a settlement,

*Wilson*, without insisting much upon the point, resorted to his second ground of objection: which was, that, though the pauper, while unmarried, might have gained a settlement at *Hensingham*,

[a] To this point see the case of *Rex v. Inhabitants of St. Giles's Reading*, Tr. 18 G. 3. 1778, Ante, p. 54.



before her settlement could be adjudged to be there. it ought to have been proved, that due diligence had been used by the parish of *Whitehaven* to discover the settlement of her husband: that at least, after what the husband had related of his birth in *Yorkshire*, some enquiry ought [a] to have been made there; and that otherwise there could not correctly be an adjudication, that this was the place of her last legal settlement.

Lord Mansfield. Nobody has found a later. "Born in *Yorkshire*" affords about as much of certainty as "born in *England*". It is not a description sufficiently precise to furnish a clew for investigation. If the husband's settlement does not appear, it is the same thing as if he had none: and then this is the woman's settlement. It is the party that alleges she has another settlement, that must shew where it is. The sessions have done right. A case was made to charge the parish of *Hensingham*, and they have not discharged themselves: which if they could, upon proof of the first settlement, they ought to have done.

*Willes, Ashurst, and Buller*, Justices, concurring,

Rule discharged and  
Both orders affirmed.

[a] Vide *Rex v. Inhabitants of Ryton*. H. 18 G. 3. 1778, ante, p. 39. *Rex v. Inhabitants of Woodsford*, H. 23 G. 3. 1783. post. and *Rex v. Inhabitants of Edifore or Hedfor*. M. 24 G. 3. 1783. post.

*Rex v. Inhabitants of Tarrant Launceston.*

Saturday,  
June 15th.

TWO Justices by an order remove *Thomas Hatcher*, *Sarah* his wife, and their four children, from the parish of *Tarrant Launceston* in the county of *Dorset* to the parish of *Marnbull* in the same county. The sessions on appeal adjudged the settlement to be in *Tarrant Launceston*, quashed the order, and stated the following case:

That *John Hatcher*, father of *Thomas Hatcher*, the pauper, was born in the parish of *Marnbull* in the said county of *Dorset*; from whence he was bound an apprentice to one *Thomas Clench* of the parish of *Stower Paine* in the said county, and served his apprenticeship with his said master in the said parish of *Stower Paine*—That afterwards in the year 1742, the said *John Hatcher*

The surrender of an old lease, which had been many years in the family, and the taking of a new one, is not a purchase within the meaning of St. 9 G.; and will not prevent a settlement being acquired by residence.



1782.

~  
 REX  
 versus  
 Inhabitants of  
 TARRANT  
 LAUNCES-  
 TON.

intermarried with one *Mary Ham* of the parish of *Marnbull*, daughter of *Editb Ham* of the said parish. That the said *Editb Ham*, at the time of the marriage of her said daughter with the said *John Hatcher*, was possessed of a certain ancient cottage or dwelling-house in the said parish of *Marnbull*, called *Mud's Plot*, with the out-houses, garden and appurtenances, for a term of 99 years, determinable on three lives.—That, immediately upon the said marriage, the said *Editb Ham* gave her daughter and the said *John Hatcher* an abiding in the said cottage; shortly after which the said *Editb Ham* built a tenement adjoining thereto, and resided partly in the one and partly in the other of the said tenements, till the time of her death in the year 1750.—The said *John Hatcher* and *Mary* his wife occupied the said original cottage during the whole of the said time; but there was no gift or conveyance of the same made by the said *Editb* to the said *John Hatcher*.—That the said *Editb Ham* had besides her said daughter, one son, called *William Ham*.—That previous to her death, she said, she meant to give a house to each of her said children, and if either of them chose, on her death, to buy the other part, he would then have the whole. The said *Editb Ham* died intestate, and no letters of administration of her goods and chattels were taken out.—That upon the death of the said *Editb Ham*, *John Hatcher* and *Mary* his wife continued in the occupation of the said original cottage; and the said *William Ham* took possession of the said new tenement.—That in the year 1755 the said *John Hatcher* purchased the said new built tenement of his brother-in-law, the said *William Ham*, for the sum of four guineas; and on the 5th day of *February* in the same year surrendered the old lease of the said cottage, called *Mud's Plot*, with the out-houses garden and appurtenances to *Mary Hussy*, the lady of the manor; who, in consideration thereof and also in consideration of the sum of thirty shillings, granted unto the said *John Hatcher*, his executors, administrators, and assigns, all the said ancient cottage or dwelling-house with the garden and appurtenances thereto belonging, called *Mud's Plot*, and a small piece of ground taken out of the waste adjoining, and for ten years past inclosed as a garden, for the term of 99 years determinable on three lives, at the yearly rent of 2s. 6d. *per annum*.—That by the said renewed lease it was declared, that the said executors or administrators of the said *John Hatcher* should hold the said premises after the death of the said *John Hatcher*, in trust for said *Mary*, his wife, if she survived him, during the then remainder of



of the said lease; and after both their deaths for the benefit of their son, *John*, in case he should survive his said father and mother.—That the said *John Hatcher*, the pauper's father, continued in the possession of the said original cottage from the time of the death of the said *Editb Ham* in 1750, and from the time of the renewal of the said lease to the time of his death, which happened in 1767: after which the said *Mary Hatcher*, his widow, continued in the possession of the said premises till the year 1771; when she conveyed the same to her son, *John Hatcher*.—That the said pauper, *Thomas Hatcher*, continued to live with his mother as part of her family for near a twelvemonth after the death of the said *John Hatcher*, his father.

1782.

REX  
versus  
Inhabitants of  
TARRANT  
LAUNCE-  
TON.

Settlement in  
Marnhull.

*Howorth* and *Bond N.* shewed cause in support of the order of sessions; and contended, that, this being merely the case of possession by one of the next of kin without administration taken out, no right became vested in the pauper's father, and no settlement could be acquired by his residence upon the premises at *Marnhull*: that the law had been so settled in the case of [a] the *King v. the inhabitants of Widworthy*: and that this principle had been carried still farther in a late case, that of [b] the *King v. the inhabitants of North Curry*; in which it was decided, that, without administration, a person solely entitled to it, but in whom the whole interest does not vest for his own use, cannot by residence acquire a settlement: that it was true, that it had been determined in the case of [c] the *King v. the inhabitants of Cold Ashton*, that possession, under an equitable title and without administration, for twenty years would give a settlement: that to be sure in the present case there had been a possession altogether for a much greater length of time, but that the cases were very distinguishable: that the continuation of the possession here had been broken at different periods, and had during the principal part of the time been of a character, that could not legally convey the right in question: that till 1750 it was merely permissive; and that from the year 1755, when the surrender of the old lease was made, a new title commenced under a purchase of a less value than thirty pounds: so that there could only be an interval of five years, during which the pauper's father held under any

[a] Tr. 10 & 11 G. 2. 1737. Burr. Settl. Cas. 109.

[b] M. 22 G. 3. 1781. Ante, p. 137.

[c] H. 31 G. 2. 1758. Burr. Settl. Cas. 444.

such



1782.

REX  
versus  
Inhabitants of  
TARRANT  
LAUNCE-  
TON.

such equitable title as in the case cited, or under any such title as could give a legal capacity of acquiring a settlement: and consequently, that an enjoyment, whatever its duration might be, under a purchase, the consideration for which was not of the amount required by stat. 9 G., [a] gave no settlement.

*Bearcroft* and *Cowper H.* were in support of the rule to quash the order of sessions: and *Bearcroft* contended, that, though no interest passed by the "abiding" given to the pauper's father, he had yet in right of his wife plainly a derivative title from her mother in the cottages and land, sufficient to entitle him upon forty days residence to a settlement; that it is not necessary that a legal interest should pass: that no person but her two children were entitled to the legal estate: that an administrator could only have holden as a trustee for them: that they had made a partition in conformity both with the law and the declared wishes of their mother: that, at common law, parceners might make partition by parole, and that, as they took no fresh estate, this right was not controuled by the statute of frauds: and consequently, that his settlement, so acquired, had been communicated to his son, the pauper.

He also insisted, that the pauper had a derivative title to a settlement from his mother: that the lease of 1755 to the pauper's father contained a clause, making a provision for his wife and giving her an estate for life in the premises: that this must be taken in the nature of a marriage settlement; and that, as she survived him, and her son, the pauper resided there with her above forty days as part of her family, he thereby gained a settlement.

He insisted that at any rate an enjoyment, which would have given a title in ejectment, could not fail of giving a settlement: that indeed it was said, that this enjoyment had been under a new purchase of an insufficient value; but that, if he had a life interest [b] in it at the time, no enlargement of that interest, how small soever the consideration, could make his title worse: and at the time of this purchase he had such a title as well as the possession.

[a] c. 7. s. 5.

[b] It seems to arise by necessary inference, though it is not expressly so stated, that at least one of the lives under the old lease must have been in being at the time of the surrender and renewal; for the case states, that he gave four guineas to his brother for his interest in the half of that, a renewal of the whole of which he obtained a very short time afterwards for the consideration of thirty shillings.



Lord Mansfield, (stopping Cowper H.)  
This was not a purchase within the meaning of the statute  
9 G. 1.; but only a surrender of the old lease and getting a new  
one, paying the fine.

Willes, J. After such a length of possession, the case of the  
*King v. Cold Ashton* is in point.

Ashurst and Buller, Justices, concurring,

Rule absolute,  
Order of sessions quashed, and  
Order of two justices affirmed.

Rex v. Inhabitants of St. Peter and St. Paul in Bath.

1782.

REX  
versus  
Inhabitants of  
TARRANT  
LAUNCES-  
TON.

Saturday,  
June 15th.

TWO justices, by an order, remove *William Hill* from the  
parish of *Lyncombe* and *Widcombe* in the county of *Somerset*  
to the parish of *St. Peter* and *St. Paul* in the city of *Bath* in the  
same county; to which parish they adjudged him *likely to become*  
*chargeable*. The sessions on appeal confirm the order, and state  
the following case:

The parishioners of the parish of *St. Peter* and *Paul*, in con-  
junction with the parishioners of the parish of *St. James* in the  
city of *Bath*, sometime since purchased a piece of ground situate  
in the parish of *Lyncombe* and *Widcombe*, and built thereon a house  
for the reception and maintenance of the poor of the several  
parishes of *St. Peter* and *Paul* and *St. James* there. In *September*  
last, the pauper, *William Hill*, being impotent and unable to work,  
was, together with all the other paupers belonging to the said  
parish of *St. Peter* and *Paul*, removed from that parish to the said  
new erected house in *Lyncombe* and *Widcombe*; where he and the  
rest of the poor of that parish have been ever since maintained at  
the expence of the parish of *St. Peter* and *Paul*, and without any  
charge to the said parish of *Lyncombe* and *Widcombe*. The said  
*Hill*, and all the other paupers, who went into the said new built  
house, carried with them certificates directed to the said parish of  
*Lyncombe* and *Widcombe*, signed by the parish officers of *St. Peter*  
and *Paul*, and allowed by two justices of the peace as the statute  
directs, acknowledging the said paupers to be settled inhabitants  
of the said parish of *St. Peter* and *Paul*, and which were delivered  
to one of the officers of the parish of *Lyncombe* and *Widcombe*.  
Notwithstanding the certificate of the pauper, *William Hill*, the  
parish

The con-  
struction of  
the certificate  
act is not re-  
strained by the  
preamble;  
but it extends  
to all classes  
and descrip-  
tions of poor.  
With respect  
to the settle-  
ment of bas-  
tard children  
by birth,  
work houses  
seem to be  
considered as  
part of that  
parish, whose  
property they  
are; and not  
of that, in  
which they  
are locally  
situated.



1782. parish officers of *Lyncombe* and *Widcombe* obtained the order in question for his removal, though he had not been chargeable to their parish. The sessions confirmed the order, &c. being of opinion, that the pauper was not the object of the certificate act, and consequently not protected by it.

REX  
versus  
Inhabitants of  
St. PETER &  
St. PAUL.

The removal  
from Lyn-  
combe, &c.  
to St. Peter's,  
&c. was ille-  
gal.

*Howorth, Morris, and Franklin* shewed cause in support of these orders. They stated the question to be, whether it was competent to the inhabitants and officers, of two or more parishes uniting under [a] stat. 9 G. to purchase workhouses for the keeping and employing of their poor, to make such purchases in any other parish, not a member of this union and confederacy; and to send their poor there without the consent of such other parish? They said, that this was a point of very general concern, and a new question upon the law of settlements; or rather a very novel and extraordinary attempt: and they insisted, that it was clear upon every view of the subject, from every act of the legislature, and every authority in the books, that except in [b] very particular cases, the poor were meant to be maintained, and could only receive relief, within their own parishes: that it would not even be contended, that the *general* powers of relieving paupers were by any express words of this act enlarged: that, if no other parishes were mentioned, the *particular* extension of these powers was naturally referable, and could only be referred, to such parishes, as had agreed to unite: and that this construction was supported by every principle of public convenience, as well as by the genius and policy of the settlement law. That, if the inhabitants of a parish were empowered to make such purchases, and to convey their poor into any parish not of the confederacy, nothing could prevent their transporting them, if they thought fit, to the most distant parish in the county; and that, if any consideration were to be paid to the unfortunate objects of these laws, it could not be denied, but that it was a hardship to remove them from the neighbourhood of every relation and friend: that, whatever may be thought of the case of the poor, an injury at any rate is sustained by the parish, to whom they are thus to be sent without any previous knowledge or approbation: that, as an indictment would not lie for a nuisance, unless this remedy were open, unless they might remove them, they were altogether without remedy: that

[a] c. 7. s. 4.

[b] As in the case of *Rex v. Inhabitants of Henlington*, H. 17 G. 3. 1777. ante, p. 6.



the injury was manifest; for, if any *one* parish is authorized without consent to send into any other, *all* parishes must be equally so; and all the parishes in a great town may raise their workhouses, bridewells, and hospitals in the same village. Suppose a number of the most populous parishes in *London* should send their poor to *Hampstead*, would such a colony be very acceptable there? Would they add to the value or the protection of property? Or would they in general improve either the health or the morals of a country village? That there was a farther injury to which the parish must inevitably be subjected; the maintenance of every illegitimate child, born in any of these poor-houses: and that this was so obvious a mischief, that, as the act had made no provision against it, it was evident that it could never have been the intention of the legislature to vest in any number of parishes a power of arbitrarily introducing into any others, the whole body of their poor, as inhabitants, together with many of their consequential burthens.

1782.  
~  
REX  
versus  
Inhabitants of  
St. PETER &  
St. PAUL.

They also insisted, though this pauper had come into the parish under a certificate and had not been actually chargeable, that it was evident from the preamble of [a] the certificate act, that that statute could not warrant this extraordinary experiment: that the principle and object of that act was of a totally different nature: that its first aim was not to make any provision for any pauper in any place; but to secure to them all an undisturbed residence, wherever they could provide for themselves: that its policy was to hold out encouragement and protection, (which out of their own parishes they had not before) to the industrious poor, and enable them to carry their strength and skill to the best market: but that the present was expressly stated not to be the case of a skilful and able bodied person, who wanted employment and was capable of labour, but of a man impotent, and sent in such helpless state for the very purpose of being provided

[a] Forasmuch as many poor persons, chargeable to the parish township or place where they live merely for want of work, would in any other place where sufficient employment is to be had, maintain themselves and families without being burthensome to any parish township or place, but not being able to give such security as will or may be expected and required upon their coming to settle themselves in any other place, and the certificates that have been usually given in such cases having been oftentimes construed into a notice in hand writing, they are for the most part confined to live in their own parishes, township or places, and not permitted to inhabit elsewhere, though their labour is wanted in many other places, where the increase of manufactures would employ more hands &c. 8 & 9 W. 3. c. 30.

F f

for:



1782.

REX  
*versus*  
 Inhabitants of  
 St. PETER &  
 St. PAUL.

for: that it was impossible therefore, that any construction could be imagined, that would extend the provisions of this act, which had throughout so very different an aspect, to the case of an impotent person coming with all the poor of his parish for the sole purpose of being maintained in another parish, total strangers, and altogether unconnected with them: [a] and that nothing could be more idle than to contend, that this construction would defeat the salutary purposes of this act; as it was impossible to raise a doubt upon the existence of these powers in the hands of the inhabitants of any number of parishes, that should agree to unite.

Lord Mansfield (without hearing the other side),

To be sure it was a radical defect in the system of the poor laws, more especially in a commercial and manufacturing country, that the poor should be all confined to their respective parishes. Possessed of industry, vigour and skill, a man who could not find work at home, was prohibited from seeking it abroad. The legislature endeavoured to cure this evil by introducing certificates; under which the pauper is at liberty to go and reside wherever he pleases. And the true principle is, to extend this protection to the utmost latitude. There should be no clog, no restraint. But then the act did not compel the granting of them. The want of workhouses was however soon felt as an inconvenience. They were not long after introduced by the legislature; and, if well regulated, a most desirable mode of relief they are. They supply comfort and accommodation for those who cannot work, and employment for those who can. In many instances, which have chanced to fall within my knowledge, particularly on the Midland circuit, they have reduced the annual amount of the poor rates one half. But this benefit could not within itself be received by every separate district; for, where parishes were small, the expence of the necessary buildings was too heavy for them. This obstacle was foreseen by the legislature and provided against accordingly. Though single parishes could only contract for these buildings

---

[a] Mr. Justice Foster appears to have inclined to this mode of reasoning in *Rex v. the inhabitants of St. George's Southwark*, and afterwards *Rex v. the Inhabitants of St. Olave's Southwark*: "Foster, J. very much doubted, (though he gave no absolute opinion) whether a certificate, given for this particular purpose of admission into an hospital for cure, could be considered as a certificate under that act; which was made with a view to persons coming out of one parish into another, to get their livelihood by their work and labour." H. 22 G. 2. 1748. Burr. Settl. Case. 283.



within their own limits, yet, where two unite, no restrictions were imposed, the power is general. It is obvious, that the workhouse of a single parish must be most conveniently situated in that parish. Upon a similar principle, where many parishes were jointly concerned, the legislature did not require that the building should be raised in either of the confederate parishes; because, in such case, a spot might be found in some other parish more central and better accommodated to their general convenience, than any part of their united district. The act therefore authorises the purchase any where: and, when once the joint purchase is made, wherever it be, it becomes a part of the local system of each contracting parish; and, if the poor will not go there, they are not intitled to relief. The same narrow spirit that has impeded the progress of this beneficial plan, now starts up again to limit this power, and almost to overthrow the act itself; which was calculated ultimately to reduce expence as well as promote industry and encourage manufactures, by employing all the poor under the eye of one master. But the objection is not warranted by the certificate act. Whatever might be the leading motive in passing that act, that statute authorises the whole body of the poor, of whatever denomination and with whatever object, to leave their own and remove into any other parish; provided they can obtain the protection of a certificate. Contrary to the spirit and policy of the act and not obliged by the letter, the court will not make an exception of a case, which the act itself has not excepted. The true policy is certainly to enlarge and not to narrow the district, within which the poor are to be maintained. As to the objection of its being an injury to property, the introduction of a numerous inhabitancy, by increasing the consumption of provisions, must unavoidably add to the value of that land, the produce of which is by such a demand consumed. As to the possibility of a few illegitimate children acquiring by birth a settlement in the parish within which the workhouse stands, it is impossible to foresee every inconvenience; and all that can be said is, that *de minimis non curat lex*.

*Buller, J.*

As to the last difficulty raised, I doubt whether the poorhouse, so occupied and become in this manner the perpetual property of the united parishes, is not to this purpose rather to be considered as part of those parishes to which it so belongs, than of the parish in which it is locally situated; upon

1782.

Rex  
versus  
Inhabitants of  
St. Peter &  
St. Paul.



1782.

REX  
versus  
Inhabitants of  
St. PETER &  
St. PAUL.

the same principle as that of many resolutions [a] in the case of such children born in gaols.

Willes and Ashburst, Justices, concurring,

Rule absolute and  
both orders quashed.

[a] 14 Car. 1638. Worcester Lent Assis. cor. Sir W. Jones, 2 Bulstr. 358. Rex v. the inhabitants of Luckington. Tr. 8 W. 3. 1695. Comb. 380. Parish of Elsing against the county gaol of Herefordshire. H. 2 G. 1715. 1 Sess. Ca. 99.

Saturday,  
June 15th.

Rex v. Pedley.

Arson is an injury only to the actual possession, and must be so laid: but where a man commits a crime, which is a *malum in se*, the probable consequences whereof are felony, and a felony ensues (as where by setting fire to his own house, he burns his neighbour's) he is guilty of felony.

THIS was an indictment tried at the last Spring sessions for the county of the city of *Bristol*, before Lord *Ashburton*, Recorder of that city.

The indictment was for Arson, and consisted of sixteen counts; one set of which charged the offence as at common law, the other under the statute.

The first count stated, that *Joseph George Pedley* of the parish of *St. Nicholas* in the city of *Bristol* and county of the same city, labourer, on &c. feloniously &c, did set on fire and burn a certain house of *John Freeman*, Esquire, *William Lucy* and *John Gyles*, there situate, against the peace &c.

2d. That the said *Joseph* &c. after the first day of *June* in the year of our Lord one thousand seven hundred and twenty-three feloniously did &c. (as above stated) against the form of the statute &c.

3d. That the said *Joseph* &c. did feloniously, &c. the dwelling-house of him the said *Joseph* &c. against the peace &c.

4th. The same was charged as an offence against the statute.

The 5th. count stated the building to have been the out-house of the said *Joseph*, and charged it as an offence at common law.

The 6th. stated the building to have been the house of the mayor, burghesses and commonalty of the city of *Bristol*, and charged it as an offence at common law.

7th. The same was charged as an offence against the statute.

8th. Count stated, that the said *Joseph* &c. feloniously, wilfully, and maliciously did set fire to and burn the dwelling-house of him the said *Joseph* &c. with intent then and there feloniously, wilfully,



*wilfully, and maliciously, to set on fire and burn the house of one Francis Parry, there situate, and being near unto the said dwelling-house of him the said Joseph, &c. by reason whereof the said house of the the said Francis Parry then and there was set on fire and burned. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said Joseph &c. then and there feloniously, wilfully and maliciously, did set on fire and burn the said house of the said Francis Parry, in manner and form aforesaid against the peace, &c.*

1782.

REX  
versus  
PEDLEY.

The 9th. count no otherwise varied the charge in the last count than by stating the building to have been the out-house of the said Joseph &c.

10th. Count stated, that the said Joseph &c. unlawfully, maliciously, wilfully, and feloniously did set fire to a certain house of the said Francis Parry, there situate, against the form of the statute, &c. and against the peace, &c.

11th. Count stated, that the said Joseph &c. feloniously, wilfully, and maliciously, did set fire to and burn the dwelling-house of him the said Joseph George Pedley there situate, with an intent then and there feloniously, wilfully, and maliciously, to set on fire and burn the house of Richard Thomas Combe, Esquire, there situate, and being near unto the said dwelling-house of him the said Joseph George Pedley, by reason whereof the said house of the said Richard Thomas Combe, then and there was set on fire and burnt. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said Joseph George Pedley, then and there feloniously, wilfully, and maliciously, did set on fire and burn the said house of the said Richard Thomas Combe, in manner and form aforesaid, against the peace, &c.

12th. Count no otherwise varied the charge in the last count, than by stating the building to have been the out-house of the said Joseph &c.

13th. Count stated, that the said Joseph &c. unlawfully, maliciously, wilfully, and feloniously did set fire to a certain house of the said Richard Thomas Combe, there situate, against the form of the statute, &c. and against the peace, &c.

14th. Count stated, that the said Joseph &c. feloniously, wilfully, and maliciously did set fire to a certain house of the said Joseph George Pedley, with intent then and there feloniously and maliciously to set on fire and burn the house of the said mayor burgesses and commonalty of the said city of Bristol, there situate, and being near unto the said dwelling-house of him the said Joseph George Pedley;

by



1782.

REX  
versus  
PEDLEY.

by reason whereof the house of the said mayor burgesses and commonalty of the said city of Bristol then and there was set on fire and burnt. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said Joseph George Pedley then and there feloniously wilfully and maliciously did set on fire and burn the said house of the said Mayor and Burgesses &c, in manner and form aforesaid, against the peace &c.

15th. Count no otherwise varied the charge in the last count, than by stating the building to have been the out-house of the said Joseph &c.

16th. Count stated, that the said Joseph &c. unlawfully maliciously wilfully and feloniously did set fire to a certain other house of the said mayor burgesses &c. against the form of the statute &c. and against the peace, &c.

Upon the trial, the jury, under the direction of the court, found a special verdict, as follows:

That the mayor burgesses and commonalty of the city of Bristol on the tenth day of August 1776 were seized in fee of a certain messuage or dwelling-house, situated in the parish of St. Nicholas in the said city of Bristol and in the county of the same city, and which said messuage or dwelling-house is described in the first and second counts of the said indictment as the house of John Freeman Esquire, William Lucy and John Gyles, and in the third, fourth, eighth, eleventh and fourteenth counts, as the dwelling house of him the said Joseph George Pedley, and in the sixth and seventh counts, as the house of the mayor burgesses and commonalty of the city of Bristol, and in the fifth, ninth, twelfth and fifteenth counts, as the out-house of him the said Joseph George Pedley, and being so seized thereof, afterwards by indenture under their common seal bearing date the day and year last aforesaid, demised the said messuage or dwelling-house to John Freeman, William Lucy and John Gyles in the indictment mentioned, from the day of the date of the said indenture, for a term of ninety-nine years, determinable with three lives; which said term is still subsisting and undetermined. That the said John Freeman, William Lucy and John Gyles, afterwards entered into the said messuage or dwelling-house and became possessed thereof, and afterwards, on the sixth day of September in the year of our Lord 1780, demised the said messuage or dwelling-house to the said Joseph George Pedley for a term of seven years from the twenty-fourth day of June then last past, determinable with three lives; and that the said last mentioned term is still subsisting and undetermined. And that the said



said *Joseph George Pedley* afterwards entered on the said messuage or dwelling-house and became possessed thereof for the term last aforesaid, and occupied and inhabited the same from thence until and upon the sixth day of *December* in the twenty-first year of the reign of our said lord the king. That the said mayor burgeses and commonalty were also on the 25th day of *January* 1762 seized in fee of three certain other messuages or dwelling-houses, situate in the parish city and county aforesaid, adjoining to the said messuage or dwelling-house first mentioned and, being so seized thereof, by indenture under their common seal bearing date the day and year last aforesaid, demised the said three houses to *Richard Thomas Combe*, in the said indictment mentioned, from the day of the date thereof for a term of ninety-nine years, determinable with three lives; which said last mentioned term is still subsisting. That the said *Richard Thomas Combe* afterwards entered on the said three last mentioned messuages or dwelling-houses, and became possessed thereof for the said last mentioned term, and afterwards, to wit, on the first day of *January*, in the twentieth year of the reign of our lord the king, demised the same to *Francis Parry* in the said indictment mentioned, for the term of one year and so on from year to year, so long as the said *Richard Thomas Combe* and *Francis Parry* should please. That the said *Francis Parry* afterwards entered into the said three last mentioned messuages or dwelling-houses, and became possessed of them for the said last mentioned term, and being so possessed, afterwards on the 29th day of *September*, in the twentieth year of the reign, &c. demised one of the said last mentioned messuages or dwelling-houses to one *John Landry*, for the term of three months then next ensuing; who, afterwards by virtue of the said demise entered into and was possessed of the said last mentioned house, and continued in the possession thereof until and upon the said sixth day of *December*, in the said twenty-first year of the reign of our said lord the king: and that the said last mentioned house is the house described in the eighth, ninth and tenth counts of the said indictment, as the house of *Francis Parry*, and in the eleventh, twelfth and thirteenth counts of the said indictment, as the house of *Richard Thomas Combe*; and in the fourteenth, fifteenth and sixteenth counts of the said indictment, as the house of the mayor, burgeses and commonalty of the city of *Bristol*. And the jurors aforesaid on their oath aforesaid farther say, that the said *Joseph George Pedley* and *John Landry*, being so as aforesaid respectively in the possession

1782.

REX  
versus  
PEDLEY.



1782.

~

REX  
versus  
PEDLEY.

session and occupation of the said messuages or dwelling-houses so as aforesaid demised to them respectively and the said *John Freeman, William Lucy and John Gyles*, being so as aforesaid lessees of the said messuage or dwelling-house so as aforesaid in the possession and occupation of the said *Joseph George Pedley*, and the said *Richard Thomas Combe* being so as aforesaid lessee of the said three other messuages or dwelling-houses, adjoining to the said last mentioned messuage or dwelling-house, and the mayor burgeses and commonalty of the said city being seized in fee of the reversion of all the aforesaid messuages or dwelling-houses after the determination of the said terms, so as aforesaid granted by the said mayor burgeses and commonalty as aforesaid, the said *Joseph George Pedley*, on the sixth day of *December* in the twenty-first year of the reign of our lord the now king, unlawfully wilfully and maliciously set fire to, and set on fire, the said first mentioned house, so as aforesaid in the possession of him the said *Joseph George Pedley*, with intent wilfully and maliciously to burn and destroy the same; and did thereby burn and destroy great part of the same; and by means thereof the said fire was communicated to the said house, so as aforesaid in the occupation of the said *John Landry*, and burned and consumed part thereof. But, whether upon the whole matters aforesaid found by the jurors aforesaid in form aforesaid, the said *Joseph George Pedley* is guilty of the felonies, or any or either of them in the said indictment specified, in manner and form as by the said indictment is supposed or not, the jurors aforesaid are entirely ignorant; and therefore desire the advice of the same justices last named and the court here. And if, upon the whole matter aforesaid found by the said jurors in form aforesaid, it shall appear to the same justices last named and the court here, that the said *Joseph George Pedley* is guilty of all the felonies in the said indictment specified, in manner and form as by the said indictment is supposed; then the said jurors, on their oath aforesaid, do say, that the said *Joseph George Pedley* is guilty of all the felonies in the said indictment specified, in manner and form as by the said indictment against him is supposed: and that he, at the time of the said felonies committed, had no goods or chattels, lands or tenements, to the knowledge of the jurors aforesaid. And if, upon the whole matters aforesaid found by the jurors aforesaid in form aforesaid, it shall appear to the same justices last named and the court here, that the said *Joseph George Pedley* is guilty of some or of one of the felonies



felonies only in the said indictment specified in manner and form as by the said indictment is supposed in some or one of the counts in such indictment, and is not guilty of some or one of the other felonies in the same indictment specified in manner and form as by such said indictment is supposed in some or one of the other counts of the same indictment, then the said jurors upon their oath aforesaid do say, that the said *Joseph George Pedley* is guilty of such of the felonies only in the said indictment specified, and upon such counts or count only of the said indictment in manner and form therein supposed, as shall so appear to the same justices last named and the court here; and that he the said *Joseph George Pedley* at the time of such last mentioned felonies or felony committed had no goods &c.; and that the said *Joseph George Pedley* is not guilty of such of the felonies specified and mentioned in such of the counts of the said indictment in manner and form therein supposed, as shall so appear to the same justices and the court here. But if, upon the whole matter aforesaid found by the said jurors in form aforesaid, it shall appear to the said last mentioned justices and the court here, that the said *Joseph George Pedley* is not guilty of the felonies or any or either of them in the indictment aforesaid specified, in manner and form as by the said indictment against him is supposed, then the jurors aforesaid do say upon their oath aforesaid, that he the said *Joseph George Pedley* is not guilty of the felonies or any or either of them in the indictment aforesaid specified, in manner and form as he the said *Joseph George Pedley* for himself by pleading hath alledged; nor did he ever withdraw himself for the same felonies or any or either of them &c.

In *Easter* term *Lawrence*, on behalf of the prosecutor, moved for a certiorari to remove these proceedings into this court. *Cowper T.* objected to the application in this stage of the business, contending, that judgment ought to have been given in the court below: but, the special verdict having been found by the direction of the court below, the writ of certiorari, and a habeas corpus to remove the prisoner, were granted. On an early day in this term the gaoler of *Bristol* brought the prisoner into this court, and returned the writ of habeas corpus. The writ of certiorari was also returned and on motion filed. The prisoner was then committed to the custody of the marshal, and an order made to bring him up on the *Saturday* following, when the special verdict was directed to be argued.

1782.

REX  
versus  
PEDLEY.



1782.

~  
 Rex  
 versus  
 PEDLEY.

It was afterwards postponed to this day; when *Lawrence* on behalf of the prosecutor stated, that upon this special verdict there arose three questions for the consideration of the court.

1. Whether at common law or under the stat. [a] 9 G. 1. a man could be guilty of arson by setting fire to a house, in which he had a term in possession; how small soever the extent and duration of his interest therein?

2. Whether a man, who sets fire to his own house, under circumstances that shew general malice, is guilty of arson, if such fire spread and burn a house adjoining?

3. Whether the adjoining house ought not to have been expressly charged to have been the property of *John Landry*, the actual occupier?

And he said, that with respect to the first point, upon a consideration of all the authorities upon the subject, he did not conceive it to be open to argument; it having been fully settled, that the shortest term in the prisoner was sufficient to prevent his being deemed guilty of arson: that arson was defined by all the writers on crown law, to be the malicious burning of the house of another man: and that the stat. of 9 G. 1., commonly called the Black Act, had been adjudged not to have been made in this instance with a view of making a new felony of that which was not felony before, but principally for the purpose of taking away the benefit of clergy from such crimes, therein specified, as at that time fell under that denomination; and consequently that this offence could not be considered as a felony either at common law or under the statute: though it seemed to him to be a very extraordinary doctrine, that it should be permitted to an incendiary, because, at the time the fact is perpetrated, he happens to have a few weeks interest in the premises, with impunity to do an irreparable injury to the reversioner and substantial owner of the house he dwells in.

He said, that at the trial *Holme's case* [b] was relied upon for the prisoner, as establishing; that it was not felony to burn a house, whereof a man is in possession by virtue of a lease for years: that it was then answered, that the propriety of that decision had been questioned in the case of [c] *Elizabeth Harris*; and the con-

[a] c. 22. f. 1. Stat. 9 G. 1. c. 22. f. 1.

[b] M. 10 Car. 1634. Cro. Car. 376.

[c] July 2, 1753. Foster's Crown Law, 113.



stant practice of convicting persons for burning houses, with intent to charge insurance offices, was also at that time insisted upon; but that since the trial he had been informed, that in a case from the *Old Bailey* in April sessions 1780, stated for the opinion of the judges, all the judges present had determined, that it was not arson by common law or by statute, for a termor to set fire to his house; and that they thought themselves bound by the authority of *Holme's case*: that this was the case of one *Andrew Bree*, who had burnt a house, of which he was in possession under a lease for three years from the reversioner in fee; that there had been a similar case of one *Spalding* about the same time: and that for these reasons he should decline arguing upon this point.

But as to the second point he insisted, that by setting fire to and burning the adjoining house, in consequence of having burnt his own, the prisoner was guilty of the felony charged in the eighth eleventh and fourteenth counts: that the doing of an act which was *malum in se* made the delinquent answerable for all the probable consequences: that setting fire to his own house was originally an unlawful act: that the jury had found it was done *unlawfully and maliciously*: and that whether it was done to defraud the reversioner or for any other purpose was not material; the probable consequences were that he must burn the two adjoining houses, and for such consequences he must answer: that, as it was *malum in se*, and found to be done maliciously, it became by consequence [a] a felony; and was as much so, as if the act had been immediate. Suppose any one had been burnt to death, or the prisoner's house had fallen at the time and buried any man in the ruins, would not the prisoner have been guilty of murder? That it has been holden, even upon a sudden provocation, that, if one man beat another in a cruel and unusual manner, so that he die, though he did not intend his death, he is guilty of murder. [b] So if a man give a woman with child a medicine to procure abortion and it operates so violently as to kill the woman, this is [c] murder: that the principle of these decisions was not confined to murder, but was applicable to arson or any other felony: and that the consequences in the instances put are less probable, than that an adjoining house should escape, when a man sets fire to his own.

[a] Cro. Car. 376. 3 Inst. 67.

[b] 1 H. P. C. 454. 473, 474.

[c] Ib. 165.

1782

REX  
versus  
PEDLET.



1782.

REX  
versus  
PEDLEY.

That it has been laid down, that even where a trespass only is intended and a felony ensues, the party is answerable for the felony: and that it is said in *Dalton* [a], that, if a man shoot unlawfully in a hand gun and set another man's house on fire and burn it, this is felony.

*Buller, J.* But that is contradicted by Lord *Hale*; [b] because in that case there was no intention to burn the house.

As to the third point, the objection that the offence was not properly laid, the adjoining house not having been in any count described as the property of *Landry*, the occupier, he contended; that, it being laid to be the house of the corporation of *Bristol* and also of *Combe*, their immediate lessee, it was sufficiently and properly laid: that, except the occupier, it was stated to be the property of every other person interested therein: and that in point of law the possession of the tenant was the possession of the landlord: that the interest must remain in the first lessee, if the underlease did not divest that interest: that it has been lately [c] determined, that an underlease was not assignment, nor the underlessee liable to the covenants: that therefore there could be no privity of estate between the prisoner and corporation, and consequently that the house in the present instance remained the property of *Combe*, in whom a property was laid: that though, in favour of life, it has been holden, that a termor does not, by burning the house he occupies, burn *ædem alienam*, yet none of the cases had gone so far as to say, that it is a false or insufficient description of the house of a tenant to call it the property of the reversioner: that this is not like the case of trespass, which is founded upon the possession singly, nor that of burglary, which must be laid [d] in *domum mansionalem*; for a mansion-house can only be said to belong to the occupier: but that it was here the house of both or either: and he relied upon the words of *Foster, J.* in [e] *Harris's* case: "the house might with strict legal propriety have been considered as the house of the landlord. Both landlord and tenant have a property: one temporary and limited, the other absolute and perpetual."

[a] Justice, c. 158. p. 506. Edit. 1727.

[b] 1 H. P. C. 569.

[c] *Holford v. Hatch*. E. 19 G. 3. 1779. Dougl. 174.

[d] 3 Inst. 67.

[e] Crown Law, fo. 116.



Lord Mansfield (stopping Cowper, T.)

Though I can neither approve of the policy of the legislature or subscribe to the legal reasoning [a] that has been used on this subject, it is now, I am sorry to say, settled by authority not to be shaken; that it is not felony either at common-law or by the statute in a tenant for a year, a month, or a day, to set fire to a house of which he is in possession. Arson it is true is burning the house of *another*; and to be sure a man may do what he pleases with what is properly his own: but that a man, who has an interest no larger than that which I have stated, may annihilate the property of his landlord, is a doctrine, which, if the point were now originally before the court, I could hardly have assented to. But the question has been submitted to the consideration of the judges, and nine of them (all who attended) were unanimous; though *Nares, J.* at one time differed. The legislature alone can therefore now apply the remedy.

As to the other ground, when a man does a flagitious act, necessarily knowing that he commits a crime, which in its consequences will probably produce a felony, if a felony is the consequence, he is guilty of that felony, and shall answer for his own acts in their fullest extent. But, though it has been very materially argued, and I assent altogether to the law as stated, upon this ground it will not avail here, as out of sixteen counts there is no one, that is adapted to the fact. Arson is settled to be an injury to the actual possession; and the mischief is, that he has not been tried for this offence, of which he appears to have been guilty; for in every count the property is alledged to be in the reversioner or his lessee, and not in the tenant. He must therefore be discharged of this indictment; and, as he has not been tried for the fact found, he must be

Remanded.

*Willes, Ashburst, and Buller, Justices, concurred.*

[a] Vide *R. v. Scofield* H. 24 G. 3. 1784. post.

He had undergone a long imprisonment; and, the proof not being direct, but circumstantial only, the jury upon the second trial found him Not guilty.

Michaelmas

1782.

REX  
versus  
PEDLEY.



1782.

## Michaelmas Term

23 Geo. 3. 1782.

Friday,  
Nov. 15th.

Page, Esq. v. Howard.

**T**HIS was an action of trespass for entering the plaintiff's close. The defendant pleaded the general issue: and the cause was tried before Lord *Mansfield* at the last assizes for the county of *Surry*, when a verdict was found for the plaintiff, subject to the opinion of the court upon the following case:

Justices have power to stop up roads under the general highway act, in cases only where a new road is set out.

In 1774 a road in the parish of *Cobham* in the county of *Surry*, leading towards the parish of *Ockham* in the said county, was lawfully diverted and turned by an order of two justices of the said county, by virtue of the powers given by 13 G. 3. c. 78. [a] s. 19. In June 1782 another road, the place in which the said trespass was committed, in the said parish of *Cobham*, leading towards the parish of *Ockham* and also towards *Chertsey*, *Byfleet* and other places, was stopped up by an order of one of the said justices and another justice for the said county, under the powers given by s. 22. [b] of the said act. A gate was erected by the plaintiff across

[a] When it shall appear, upon the view of any two or more of the said justices of the peace, [that any public highway may be diverted, so as to make the same nearer or more commodious to the public &c. and the owners of the lands through which &c. shall consent &c., it shall and may be lawful by order of such justices, at some special sessions &c. to divert, turn, and stop up, and inclose, sell, and dispose of such old highway &c. and to purchase the ground and soil for such new highway &c. by such ways and means &c. in all respects &c. as herein before mentioned with regard to highways to be widened or diverted. Vide sect. 17.

[b] If in any parish &c. where any highway shall be diverted and turned by virtue of this act, it shall appear to the justices who are hereby authorized to view or inquire into the same, that



across the road so stopped under the last order of 1782; and the said gate locked up; and the defendant broke down the same.—  
*Quere*, whether the justices under the said act s. 22. had a power to make the said order for stopping the road, where the said trespass was committed? If they had, the verdict to stand. If not, to be entered for the defendant.

The question upon this case was, whether the justices who made the last order for stopping the road, in the place where the trespass was alleged to have been committed, and who were not both of them the same as those who made the first order, were under s. 22. of the act empowered to make such order?

*Bond, G.* for the plaintiff contended, that the legislature meant to give an original jurisdiction to the magistrates, who acted under s. 22.; that the power thereby given was a substantive power, and independent of the former clause: that, if it must be the act of the same magistrates, it must be done at the same time also; and, if it is taken to be at the same time, it would in its consequences be absurd; for, at the time of diverting the roads, it may not be possible to foresee what roads it may be necessary to stop up; and that by the express terms of the prior clause it is only where a road has first been diverted, that any authority is given to stop them.

*Rous* for the defendant insisted, that the power given in the latter clause was not substantive, but merely auxiliary of the former: that it must be exercised at the same time, and by the same justices; and not at any distance of time by others: that, if the words were more doubtful, the analogy from the course of proceeding under the act afforded so clear an illustration of the sense of the legislature, as to remove every thing like difficulty upon the question: that the act directs, that the money, arising from the sale of the road stopped up, shall be applied to purchase the land where the new highway shall be made: that this was now impossible: that it did not appear, that there was here any new road to be purchased: that, if a new set of magistrates might

that there are other highways within such parish &c. besides that so to be diverted and turned, which may, without inconvenience to the public, be diverted into such new highway hereby authorized to be made or into any other highway or highways within such parish &c. and the charge of repairing such highway or highways may be thereby saved to such parish &c. it shall and may be lawful for such justices to order such highway or highways which shall appear to them unnecessary, to be stopped up, and the soil thereof sold &c.

1782.

PAGE

versus

HOWARD.



1782

Fact  
versus  
Howarth.

now, at the end of eight years, interfere, they might at the end of 800; that the subsequent clause therefore was plainly referable to the prior; and that the powers which it gave could be exercised by those only, who enforced the former.

Lord Mansfield. However we may agree, that it might have been better, if the necessary remedy had been extended to both cases, yet upon looking into the act of parliament we think we cannot be warranted in putting such a construction. This is not a general power, but tied up to a particular case. The power to shut up roads is given only, where there is a new road to be set out. This shews, that it was meant to be one intire act of the magistrates: that the two clauses make one provision, and that the powers under them were to make but one transaction. The clauses are so connected, that they cannot be separated.

Buller, J. The wording of the latter clause is decisive, that these powers are to be exercised at the same time. It enacts, that if the justices authorised to enquire &c. think, that, besides the roads so to be diverted and turned, other roads may be diverted &c. they may stop them. The orders for this purpose are plainly intended to be made at the same time and by the same magistrates, who were acting under the former clause.

Wiles and Ashburst, Justices, concurring,

Postea to defendant.

Tuesday,  
Nov. 26th.

Wetherell, Esq. v. Hall.

An equitable as well as legal estate gives a qualification under the game laws: but the clear value of the necessary estate means the value, clear at least of all mortgages or incumbrances created by the owner, or those under whom he claims.

THIS was an action of debt, upon the stat. 5 Ann. [a] for the better preservation of the game. The declaration consisted of several counts; the second of which charged the defendant, with using a certain engine called a gun to kill and destroy the game, not being a person qualified so to do. The defendant pleaded the general issue; and the cause was tried before Eyre B. at the last assizes for the county of Durham; when the jury found a verdict for the plaintiff upon the above count, subject to the opinion of the court upon the following case:

That the defendant, upon his marriage with his present wife, became seized in her right of an estate of inheritance, part of

[a] c. 14. s. 4.

which



which was copyhold, and held of the manor of *Bondgate* in *Darlington* in the county of *Durham*; which, at the time of committing the offence mentioned in the declaration and before, were together of the clear yearly value of one hundred and three pounds: but it farther appeared, that the said defendant and his wife, before the committing of the offence, (to wit) on the tenth day of *May* one thousand seven hundred and eighty, duly surrendered a close of land, parcel of the said copyhold estate, unto *Robert Kelsey* and his sequels in right, upon condition, that if the said *Robert Hall* and *Mary* his wife, their sequels in right, executors or administrators, should and did well and truly pay or cause to be paid unto the said *Robert Kelsey*, his executors administrators or assigns, the full and just sum of four hundred pounds of lawful money of *Great Britain*, with legal interest for the same, at or upon the tenth day of *November* then next, that then and upon such payment in manner aforesaid the said *Robert Kelsey* and his sequels in right should and would resurrender the said premises unto and to the use of the said *Robert Hall* and *Mary* his wife and their sequels in right at their proper costs and charges accordingly; and that the said *Robert Kelsey* was upon the said tenth day of *May* admitted thereto; and the said mortgage still continued upon the same; and that the said close, at the time of committing the offence and before, was of the clear yearly value of fourteen pounds, parcel of the said one hundred and three pounds; and that the interest of the said mortgage had been regularly paid, and the mortgagee had not entered into possession of the copyhold close mortgaged to him.

1782.

WETHERELL  
versus  
HALL.

The question reserved for the opinion of the court was, whether the defendant at the time of committing the offence was duly qualified to use engines to kill and destroy the game?

*Lambe* for the plaintiff contended, 1. that a legal estate of 100*l.* *per annum* was necessary to constitute a qualification to kill game: that here the defendant had no more than an equitable estate in the part mortgaged: that such estate cannot be taken notice of by a court of law in the construction of an act of parliament: that by the stat. [a] 22 and 23 *Car.* 2. an estate of an annual value less

[a] All and every person and persons *not having* lands and tenements, or some other estate of inheritance, in his own or his wife's right, of the clear yearly value of one hundred pounds *per annum* &c. are hereby declared to be persons by the laws of this realm not allowed to have or keep for themselves, or any other person or persons, any guns &c. c. 25. s. 3.



1782.

WETHERELL  
versus  
HALL.

than 150/. must be of an inheritable nature to give a qualification: that the defendant, so far from having an interest of this character and description, was only tenant at will to the mortgagee.

But Lord *Mansfield* intimating, that it would be difficult to support this ground of argument, Mr. *Lambe* insisted,

2. If an *equitable* estate were considered as giving a qualification, that still, in point of *annual value*, the defendant had not, upon the true construction of the act of parliament, an estate sufficient to qualify him. That the words of the act were; "the *clear* yearly value of 100/." that this could not mean the gross value of the estate, but must mean the net income: that such it could not be, if, by incumbrances of any sort, the issues and profits were brought within that sum: that the object of the legislature was, to intitle those only, whose independence, arising from the produce of their lands, would enable them to use these rights for the purpose of amusement: that, upon comparing the value of land at the time this law passed with its present value, it would be found that the measure of this independence had already been reduced much below the intention of the legislature: that if the construction contended for were admitted, no degree of interest whatsoever in the produce of lands would be necessary, and the intention of the legislature must be totally frustrated; inasmuch as the holder of an estate, whether he charged it himself to its utmost value or had it transferred to him under such charge, without having, or without ever having had, an income arising out of land to the amount of one farthing, must in such case be intitled.

Lord *Mansfield* calling upon the other side,

*Chambre* for the defendant stated the only question to be, whether the interest of the mortgage was to be considered as such a reduction of the annual value of the estate, as would destroy the defendant's qualification? and he contended, that this was a penal law, and would not therefore be extended by construction: that it was besides a general law and in its terms does not require the party to have a *legal* estate: that the words of the act are "not having &c.;" within which words an *equitable* estate is sufficient: that in deciding on points of this nature the substance ought principally to be regarded: that the *cestuy que trust* was substantially the owner: that courts of law in many instances advert to the practice of a court of equity; as in the common case of a trustee, who is not permitted to eject his *cestuy que trust*.

See



See then how a mortgagor is considered there? The mortgage is in substance a specialty debt, the equity of redemption is considered as real estate, and descends to the heir of the mortgagor; who is considered as a debtor, and his personal assets liable in the first instance to discharge the mortgage: and, though at law the heir of the mortgagee takes a legal estate, yet the personal representatives are considered as intitled to take the benefit and receive the mortgage debt.

1782.  
WETHERELL  
versus  
HALL.

He farther insisted, that a mortgagee can never get possession, if the mortgagor is ready to pay the money: that by statute [a] it may be paid *impendente lite*: and that, if the legal estate only were to be regarded, an estate of a thousand pounds a year, mortgaged in fee for one hundred pounds, would not furnish a qualification.

That the only question that remained was, whether the interest of the mortgage money was to be considered as an outgoing, that would reduce the value of the estate below 100/.? and he contended, that the interest was not a thing issuing out of any part of the estate in the nature of a rent or service: that both principal and interest were a debt: that the interest must be considered as a debt on the personalty, just as the principal is considered as a debt: and that the estate was neither made of greater or less value by the mortgage, but was merely a pledge for the payment of the debt: that the legislature therefore, when they used the words "clear yearly value," meant to advert only to the value of the estate itself, and not to the quantity of interest, that any person might have in it; the thing itself without any regard to the charge upon it; provided only that the party was in possession: that in the same manner, in the case of a mortgagee in possession, there can be no doubt, but that he is intitled to kill game: and the court in such case will not inquire into the amount of his interest money, of the sum advanced to the mortgagor upon his land; provided the security, the land itself, be of the annual value, which the law requires: that the court, before they pronounced, would well weigh the consequences of such a doctrine, as is contended for: that the justices, who must inquire into this in a summary way, must make all persons of whatever ostensible estate, disclose their private circumstances; which would be too great an extension of a law, already considered in many instances as tyrannical: that a

[a] 7 G. 2. c. 20. s. 1.



1782.

WETHERELL  
versus  
HALL.

rent charge indeed or services, issuing out of an estate, as matters of notoriety, might perhaps be considered by the justices; but of such things only, as were ostensible, could they take cognizance: that, if every private family transaction in money concerns were to be laid open, if it could be seriously argued, that such discussions were proper subjects for a summary jurisdiction, it would be investing justices and informers with powers of harrassing the country, as far beyond any known precedent, as it was beyond the intention of the legislature: that their object had not at any time been an inquiry into debts, but the actual possession of, and interest in, landed property, and the visible amount and extent of that property.

That, as there was no authority directly upon this subject, it was proper to consider the question by analogy to the statutes *in pari materia*: that most statutes in these cases require a qualification altogether in land; but that two statutes in the reign of King James intitle the party under personal as well as real qualifications: that the statute 2 Jac. [a] enacts, that no one, "except such person or persons, which shall be seised &c. of lands, tenements or hereditaments of the *clear yearly value* of ten pounds by the year or more, over and above all charges and reprises; or be possessed of goods or chattels to the full value of two hundred pounds to his own use, shall be qualified &c.:" that it appears from hence, that the mere having in one's own right and commanding the use of personal property is sufficient to give a qualification, whatever may be the amount of such a proprietor's debts; consequently that when the same statute requires the having of a real estate of a *clear yearly value*, it must mean an estate, which would let for a clear sum without any deduction to be allowed to the occupier, and exclusive of charges and reprises issuing out of the land; and that, if debts were not to affect the *full* value, mortgages, which were no more than debts, ought not to reduce the *clear* value; and that, such not being charges strictly issuable out of the lands, no inquiry was meant to be given into them: that in like manner the stat. 3 Jac. [b] qualifies persons "having any manors, lands, tenements or hereditaments of the *clear yearly value* of 40 l., or worth in goods and chattels 200 l.:" that the stat. 13 R. c. 13., which was the earliest upon this subject, and

[a] c. 27. s. 3.

[b] c. 13. s. 5. This section respects shooting deer and conies only.

which



which must have been referred to by the framers of the above acts, 1782.  
qualifies laymen, *having* lands or tenements to the value &c.,  
and clergymen, *advanced* to the value &c.; and that, as the title  
of this act was "none shall hunt, but they which *have* a suffi-  
cient estate," a collateral charge could not affect the privilege;  
and, if there was nothing strictly issuing out of the land, the *hav-*  
*ing* here must be sufficient.

WETHERELL  
versus  
HALL.

That in other cases, where the legislature have used the same  
language, mortgages have not by construction been considered as  
incumbrances that reduced the value of the estate: that by stat.  
8 H. 6. c. 7. knights of shires are to be chosen by "people  
&c." whereof every one of them shall *have* free land or tenement  
*to the value &c. above all charges*: that not only mortgages were  
never construed to affect this right, but even so late as the 7th  
and 8th of W. 3, the legislature [a] declared, that "the mortga-  
gor or *cestuy que trust* in possession shall and may vote for such es-  
tates, notwithstanding such mortgage or trust."

*Buller, J.* But he must swear, that he has forty shillings a-  
year, above every charge payable in respect of them.

*Chambre,* But this is by the express provision of [b] subse-  
quent statutes.

*Lord Mansfield.* The privilege here is given to property; and  
the *cestuy que trust*, the mortgagor, is really the owner: the trus-  
tee, the mortgagee, is merely nominal. We consider the defend-  
ant's interest in this court just as it would be considered in a  
court of equity. It is an interest subject to the payment of the  
mortgage: it is a qualification of property; and, though it is not  
necessary, that he should have a legal estate, he must have such  
property in the land, as shall produce a clear income of 100*l.*  
*per annum*; or it might be carried so far, as that he might have  
nothing, and yet enjoy the privilege. What then are a mortga-  
gor and mortgagee in Chancery? One the owner, and the other,  
as having a charge upon the land; and the charge goes along  
with it.

*Buller, J.* In the case of rent-charges the cognizance of the  
justice is admitted; and in many others they must interfere, as in  
contracts between landlord and tenant. Neither is there any pre-

[a] c. 25. s. 7.

[b] 18 G. 2. c. 18. s. 1. and 19 G. 2. c. 28. s. 1.



1782.

WETHERELL  
versus  
HALL.

tence on the part of the defendant to complain of hardship. Possession is *prima facie* evidence of property. The defendant must therefore be presumed to be the intire owner. The hard task lies upon the other party; who must make proof of the contrary. If the justice may receive proof of rent-charges, and services, what should prevent his doing the like as to mortgages? The only point then is, whether the words "clear yearly value" mean "clear yearly value to the person in possession?" The words of this act would by themselves leave little room for doubt; but, when explained and supported by the statutes of K. James in *pari materia*, the words of which are, "over and above *all* charges and reprints," it can no longer admit of question, but that it must mean clear value to the person in possession: for, by the common rule of construction, all statutes upon the same subject are considered as making one system of law; and consequently the words in the two last statutes must be referred to the statute in question.

Willes and Ashurst, Justices, concurring,  
Judgment for the plaintiff.

# Hilary Term

23 Geo. 3. 1783.

Friday,  
January 24.

Rex v. Inhabitants of Woodsford.

On removal  
of a widow,  
it is enough  
in the first in-  
stance to  
prove her  
maiden set-  
tlement.

TWO Justices by an order remove *Mary Pitman*, widow, and her four children from the parish of *Woodsford* in the county of *Dorset* to the parish of *Wimborne Minster* in the same county. The sessions on appeal adjudged the settlement to be at *Woodsford*, quashed the order, and stated the following case:



That by a rule of the quarter-sessions for the said county of *Dorset* it is ordered, that, upon all cases of appeals against any order or orders of removal, the appellants shall begin, and in the first place shew some settlement of the pauper or paupers out of the parish of the said appellants; and thereupon the respondents shall go into their case. Upon the hearing of the above appeal, in pursuance of the said rule, the appellants produced a copy of the register of the birth of *Mary Scutt* in *Asspuddle*; and the pauper, *Mary Pitman*, swore, that *Mary Scutt* was her maiden name. The counsel on the part of the respondents objected, that this was not sufficient; but that the birth of the pauper's husband, *Robert Pitman*, or some other settlement of his, ought to have been shewn; and farther, that to identify the said *Mary Scutt*, it was necessary for the appellants to prove the marriage of the said *Mary Scutt* with the said *Robert Pitman*. The court adjudged, that the proof of the birth of *Mary Scutt* was sufficient; and that the *onus probandi* of the marriage lay upon the respondents, in order to prove their case, and quashed the said order of justices.

1783.

Rex  
versus  
Inhabitants of  
WOONSFORD.

*Cowper, H.* moved for a rule to shew cause, why this order should not be quashed, upon the ground, that, the pauper having been removed in the character of a widow, such order imported, that it was a removal to the place of her late husband's settlement: that, unappealed from, it would be conclusive evidence of his settlement: and that as this must consequently have been the only point meant to have been brought in issue between the parties, the maiden settlement of the woman was nothing to the purpose, and did not apply to the question before the court.

*Sed per curiam.*

It may be, the husband had no settlement; and if he had, till discovered, her own would in the mean time remain. You were not surpris'd; but could not or would not answer it. It is enough in the first instance. The sessions have done right.

Motion denied.

Vide *Rex v. Inhabitants of Ryton, H. 18 G. 3. 1778. ante p. 39. Rex v. Inhabitants of Hensingham, Tr. 22 G. 3. 1782, ante, p. 206. and Rex v. Inhabitants of Edisore or Hedser, M. 24 G. 3. 1783. post.*

Rex



1783.

Wednesday,  
Feb. 5th.

It must appear upon the case stated, that a place either is legally and actually a vill, or at least that it is so reputed, to warrant an application for a mandamus to appoint overseers.

The sites and areas of antient cathedrals, colleges and inns of court, are extraparochial.

## Rex v. Justices of Peterborough.

**W**ALLACE had obtained a rule to shew cause why a mandamus should not issue, directed to *Charles Tarrant*, dean of *Peterborough* and the Reverend *William Browne*, justices in and for the liberty of the soke of *Peterborough* in the county of *Northampton*, to appoint overseers of the poor of a certain vill or township called *Peterborough Minster*, otherwise the *Minster*, within the said liberty.

The facts upon the affidavits in support of the rule were, that within or close adjoining to the city or town of *Peterborough* is a certain place, called *Peterborough Minster*: that it has always been extraparochial, and always had a number of poor belonging thereto: that such poor had till the seventh of *May* last been always maintained, as the poor belonging to such extraparochial place, by the directions of the dean and chapter of the said place, called the *Minster*; and out of some fund belonging to them: that on the ninth of *May* last the chapter clerk of the said dean and chapter, being applied to to receive *Esther Key*, widow, a pauper belonging to the said extraparochial place and who had come by pass to the parish of *St. John the Baptist*, within the said city or town, and close adjoining to the said *Minster*, as a rogue and vagabond, declared; that the said dean and chapter had already so many poor, that they did not know how to maintain them; and that, though this pauper did belong to the *Minster*, he should not take her in, as there were no officers appointed within the *Minster* to whom any order of removal could be directed; and that he meant to avail himself of such want of appointment: that, upon a statement of these facts, application was also made to the defendants and to two other justices of the peace for the liberty of the soke, all of whom resided within the said extraparochial place called the cathedral of *Peterborough* or *Minster*, to appoint an officer for the same and to grant their order of removal directed accordingly: that the said justices refused so to do, no officer having at any time before been appointed for such place; though it was sworn they believed, that the pauper of right belonged thereto: that the said extraparochial place contains upwards of forty-six acres of ground; known by several distinct names, viz. the *Minster-Close*, the *Minster-Square*, the *Vineyard*, &c., and, together



together with the bishop's and six prebendal houses, twenty-five dwelling houses at least, exclusive of poor houses; and that these houses are inhabited, except in the instance of the bishop and three of the prebendal houses, altogether by laymen or by strangers to the cathedral, and those generally persons of fortune: that the said twenty-five dwelling houses contain upwards of 124 persons: that there are also in the said extraparochial place several poor houses, containing a number of poor, who have by birth, marriage or servitude, acquired a settlement therein; and who from some fund belonging to the dean and chapter receive as a maintenance the sum of two shillings or eighteen pence by the hands of the chapter clerk together with their division of the sacrament money, amounting to sixpence per week over and above the aforesaid payment: that there is also in the said *Minster* a grammar school with an annual endowment for the support of the master, payable out of some fund belonging to the dean and chapter; by whom the said master is appointed: that within the said *Minster* there is a place for the performance of divine worship and for the burial of the dead; and that it appears from the register there kept for the purpose, and which is distinct and separate from that of the parish church of St. *John* Baptist, that from the year 1756 to the end of the year 1781 there have been 42 marriages and 48 baptisms, and from the year 1757 to the end of the year 1781 58 burials had therein: that the land and buildings situate within the said *Minster*, from a valuation taken thereof, are of the annual amount of 400*l.* at least: that the arrears of interest due upon the sum of 200*l.* lodged in the hands of one of the deponents in support of this rule in the character of trustee, and which had devolved upon three poor girls who had become chargeable to the said extraparochial place, were demanded of him by the chapter clerk of the said cathedral or *Minster* and by him paid accordingly, and a receipt given as follows:

Received 6th November 1782 of Roger Parker Esq. the sum of 2*l.* 3*s.* 8*d.*, the balance of his account with Jeremiah Stamford, for interest money in full to the 11th day of September last, and to be by me applied towards the maintenance of the three children of the said Jeremiah Stamford, who have become chargeable to the dean and chapter of Peterborough.

Nataniel Hudson, Chapter Clerk.

2*l.* 3*s.* 8*d.* I i That

1783.

REX  
versus  
Justices of  
PETER-  
BOROUGH.



1783.

REX  
versus  
Justices of  
PETER-  
BOROUGH.

That in the memory of another of these deponents, who was 86 years of age, there had been several other poor houses inhabited within the said extraparochial place, but that some of them were fallen down, and that others had been taken down by order of the dean and chapter to prevent their being inhabited.

Against the rule it was sworn by the defendants, doctor Tarrant and doctor Browne, the dean and one of the prebendaries of the cathedral church of *Peterborough*, that the precinct or close of the cathedral church of *Peterborough*, described in the affidavit in support of the rule, by the name of the *Minster*, is extraparochial; and is not a township or vill or was ever so reputed: that there have been poor persons many years resident within the said precinct; and that within their precincts the dean and chapter are by their statutes required to distribute in charity the sum of 20*l.* annually: that it appears by a register book kept for that purpose that till the year 1737 the aforesaid sum and no more had been annually so applied from the chapter fund; and that this sum together with the sacrament money had been sufficient for the support of the poor then belonging to, or inhabiting, the said precinct: that it appears from the same book that in the year 1737, this sum proving insufficient, a farther sum was expended for their relief, and that since that period the expence of maintaining the poor belonging to the said precinct has in some years amounted to upwards of 80*l.*; but that the dean and chapter have, although without any other appropriated fund, defrayed the whole expence: that this burthen has tended to the diminution of the revenue allotted for the stipends of the several officers of the said cathedral, the repairs of the fabric and other contingent expences: that the land and buildings within the said precinct, exclusive of the bishop's palace and other official houses, belong partly to the bishop and partly to the dean and chapter; and are all (except two houses which are the property of private persons) occupied by their respective lessees: that there never was any constable or other civil officer appointed or chosen for the said precinct or close, or any overseer of the poor or churchwarden; nor have the inhabitants ever contributed to the relief of the poor within the precinct or been called upon so to do: that, upon the application made to these deponents to appoint an overseer of the poor for the precinct of the cathedral church of *Peterborough* and to grant an order of removal &c., as there appeared no trace or vestige of any such office in any of the writings or registers belonging to the



the said church, and as no such officer or churchwarden ever had to their knowledge been appointed, they were of opinion, that they had not authority to make such appointment; and therefore declined to comply with the requisition made.

*Howorth* and *Blake* shewed cause against the rule for a mandamus; and insisted, that the precinct in question, having been formerly the site of a religious house and now that of the cathedral, and being also that part of the estate and revenue of the church which was set apart for the residence of its highest ministers and officers, was extraparochial; and not in its nature that sort of establishment which had ever in any instance been subjected to temporal cares and parochial duties: that other places, set apart for studious retirement, though not expressly dedicated to religion, have ever had a similar protection: that if the bounty of the statutes and the humanity of the present possessors had so long induced them to make a voluntary provision for the poor within their precinct, it could hardly be thought a legal, any more than it was an equitable, ground of subjecting them to unprecedented burthens, because the extent of their benevolence and charity had been carried beyond all example: that it was a decisive answer to this application, that, except upon the face of the rule, no charge appeared that this place was either a township or vill: that in the case of [a] the *K. v. inhabitants of Denham* it is holden essential, that the place "at the least should have the reputation of a vill or town" to be intitled to have overseers appointed within it under stat. 13 & 14 *Car. 2. c. 12.*: that, nothing of this sort being disclosed by the affidavits, the authority of the case of [b] the *K. v. Justices of Bedfordshire* would govern the present, and consequently this rule be discharged with costs.

*Wallace* in support of the rule insisted, that what is a vill within the act of parliament is matter of law; and, as is laid down by *Hardwicke Ch. J.* in the *Denham* case, "must be left to the judgment of the court, [c] upon the circumstances of the

1783.

REX  
versus  
Justices of  
PETER-  
BOROUGH.

[a] E. 8 G. 2. 1735. Burr. Settl. Cas. fo. 38.

[b] E. 22 G. 3. 1782. Ante, p. 167.

[c] So it is laid down by the same learned judge and the whole court with respect to fraud, in the cases of *Rex v. Inhabitants of Tedford*, Tr. 8 & 9 G. 2. 1735. Burr. Settl. Cas. 57. And *Rex v. Inhabitants of St. Nicholas in Harwich*. H. 15 G. 2. 1741. Ib. 171. And so generally, upon returns made by the justices at sessions, by Lord Mansfield and *Denison* and *Foster, J.* in the case of *Rex v. Gayer, esquire*. H. 30 G. 2. 1757. Burr. Rep. 245. Vide also *Rex v. Inhabitants of Eyford*. H. 25 G. 3. 1785. Post.



1783.

REX  
versus  
Justices of  
PETER-  
BOROUGH.

case stated :” that calling a place a vill is not making it such : that when the whole facts, that can induce a belief or warrant a conclusion upon the premises, are brought forward for the consideration of the court, what the party swears as to opinion or reputation must be immaterial : that, unless this were so, the return of special circumstances was a nugatory and ridiculous ceremony : that the facts disclosed upon these affidavits afforded ample and abundant proof, that the place in question had been properly denominated a vill : that not only in the size of the place and number of the houses every requisite had been satisfied, that had ever been holden necessary to constitute a vill ; but that the rites of marriage, baptism and burial were constantly performed there : and that the privilege of administering the sacraments, especially that of baptism and the office of burial, are compleat evidence of parochiality : that their having uniformly and immemorially maintained their own poor, contrary to the usage of these establishments, was accepting a burthen, which it was not very easy to suppose they would have submitted to upon any other principle, than that of conviction and a sense of duty and obligation : that, this district having to the great improvement of the revenues of the church been built upon and leased out to men of fashion and fortune, strangers to the church and not intitled to any ecclesiastical privileges and immunities, but in whose families numerous settlements by service are necessarily acquired, the duty and obligation of providing for them was as strong in equity as it was in point of law : that it was true, that in the *Bedfordshire* (Sir George Osborn’s) case, the court said, that, before they would compel magistrates, in whom the law has lodged a discretionary power to act against their own impressions of duty, they would at the least require that the affidavits in support of such an application should say, that the place had the reputation of being a vill : but that that had been said in a case, in which, as brought before the court by affidavit, there was a total failure of all those circumstances which could warrant the court in drawing the conclusion, that the place in question was a vill ; and that the leading circumstance, which pointed that way, had been expressly charged by the court to have been an imposition. That all other cases in the books, in which it has even been hinted by the court, that it was necessary to state that the place was a vill by reputation, were cases in which there was a defect of other proof necessary to found the conclusion of its being



being actually and legally such; and were also cases, in which some farm or mansion, antiently a single house, had newly been turned into several tenements, or to which one or two cottages had been added for the accomodation of labourers or servants: but that here there were sixteen separate and independent household establishments of persons of fortune.

Lord Mansfield. This space comprehends no more than the site of the cathedral and the area round it; and consequently was in former times within sanctuary, and as such sacred and inviolable as the church itself. In modern times to be sure there is no such thing as sanctuary; but these places have throughout all ages without interruption enjoyed those immunities; as *Westminster Abbey* now does and other places of the like nature. The antient inns of court, though not exactly upon this principle, have also at all times been privileged: and a similar exemption was not questioned in a late case, that of [a] the *K. v. Gardner*; with respect to that part of the court and garden ground of *Catharine Hall* in the university of *Cambridge*, which lay within the old and extraparochial part of that foundation. Would you say, that *Christchurch* in *Oxford* [b] is a vill? I am not satisfied from this affi-

1783.

REX  
versus  
Justices of  
PETER-  
BOROUGH.

[a] Tr. 14 G. 3. 1774. Cowp. 79.

[b] There seems at this time of day to be no very reasonable, even if there were any legal, ground to consider any of our antient colleges or the closes or sites of our cathedrals, as such, places, in which it would be proper for the justices under stat. 13 & 14 Car. 2. c. 12. to introduce parochial regulations. And yet, were not these societies in general regulated very differently from that of *Peterborough*, it seems to be rather questionable; whether the exemptions they at present enjoy could be long supported. In the universities there is no other description of persons whatsoever admitted into the colleges, but the servants, or necessary officers of the matriculated members and their families; none but those who are poor, or derive a profit or subsistence from the body into which they are admitted; the very reverse of which is the case of this precinct; where they, who are admitted, are wealthy, and contribute largely to the support of the body that receives them; to whom they are not at all necessary, or bear the smallest relation.—While the space, of old allotted to the conveniences of these bodies, continues to be applied to the original purposes of the foundation, while it is occupied by their officers or any person fairly and properly bearing a relation to them, it may be, that they ought to continue privileged beyond the public at large: but, when they depart from the object of their institution, admit strangers into their sanctuary, derive a considerable revenue from such admissions, and burthen other parishes with the settlement of all the servants of these inmates, it cannot be within the spirit of the privilege, that they should be permitted to make sale of it; and, for the purpose of enhancing the value of their property, convert that, which could only have been meant as a benefit, in the nature of an exemption, to themselves, into an injury to the public at large, and a benefit, and an exemption from the payment of a general tax, to all their tenants, resident upon that spot.



1783.

REX  
versus  
Justices of  
PETER-  
BOROUGH.

davit that this place is a vill; and the party applying don't even call it so.

*Buller, J.* As the party applying does not venture to assert, that this place had ever any civil officer, or was ever even reputed to be a vill (the last of which, where the facts of the case do not within some clear principle of law shew the place to be of that denomination, the court has holden to be indispensibly necessary for the purpose of founding an application for a mandamus) this case falls within that [a] which has been cited, and the rule must be pronounced accordingly.

*Willes, and Ashurst, Justices, concurring,*

Rule discharged  
with costs.

Vide *Rex v. Justices of Bedfordshire*. E. 22 G. 3. 1782.  
Ante, p. 167. *Rex v. Inhabitants of Eyford*. H. 25 G. 3.  
1785. post.

[a] *Rex v. Gardner*. Cowp. 79.

Wednesday,  
Feb. 5th.

*Rex v. Franklyn.*

Taking an  
active part  
in company  
with armed  
persons, in de-  
fiance of the  
laws of cus-  
toms and ex-  
cise, is a ca-  
pital felony  
within the  
stat. 19 G. 2.  
c. 34.

**P**ARTRIDGE had obtained a rule to shew cause why a writ of habeas corpus should not issue, directed to the keeper of the castle of the city of *Norwich*, to bring up the defendant, who had been committed under stat. 19 G. 2. [a] for the punishment of persons going armed or disguised in defiance of the laws of customs and excise, for the purpose of being bailed. The commitment charged, that he had *with others armed* aided and assisted in rescuing uncustomed goods &c. and assaulted &c. and wounded and maimed &c. an officer of excise in the execution of his duty.

[a] Which enacts, "That if any persons, to the number of three, or more, armed with fire arms, or other offensive weapons, shall &c. be assembled in order to be aiding and assisting &c. in rescuing or taking away prohibited or uncustomed goods, after seizure, from any officer or officers of the customs or excise &c.: or in case any persons, to the number of three, or more, *so armed as aforesaid*, shall &c. be so aiding or assisting &c. or shall forcibly hinder, obstruct, assault, oppose or resist any of the officers of the customs or excise, or other his majesty's revenue, in the seizing or securing any such goods &c. then every person so offending, being thereof lawfully convicted, shall be adjudged guilty of felony, and shall suffer death as in cases of felony, without benefit of clergy." c. 34. f. 1.

Mr.



Mr. Partridge made the application for a habeas corpus upon the ground, that the commitment did not charge any offence against the statute: that it stated only that the prisoner did certain acts *with others armed*; but did not alledge that he *personally* was armed, as the act required: and this fact was supported by the affidavit of the prisoner.

The court, though they refused to grant the writ in the first instance, intimating their opinion, that it was not necessary to constitute the offence, that every person concerned should be armed, yet as it was a capital felony, granted a rule to shew cause, that the point might be considered and settled.

Kenny, Attorney General, now shewed cause against this rule; and insisted, that the objection very much resembled a distinction, that had been attempted on the Black Act [a]; under which it being necessary that the face should be blacked to subject the offender to its penalties, it had been contended, that, where the face was covered with crape, or a black mask used, the words of an act so penal were not satisfied.

Partridge. The preamble also here shews the object of the act, and that it was aimed at persons with arms in their hands.

Attorney General. But another branch of the preamble speaks of wounding and maiming excise officers in the execution of their office, without mentioning arms.

Partridge. But it adds, "so associated and assembled as aforesaid" [b]; which can receive no other construction than as referring to their being armed.

The Attorney General then insisted, that whether the charge of maiming, stated in the commitment, would or would not support it, it was not necessary within the meaning of the act, that

[a] 9 G. 1. c. 22. f. 1.

[b] The words are: "Whereas divers dissolute persons have associated themselves, and entered into confederacies to support one another, and have appeared in great gangs in several parts of this kingdom, carrying fire-arms or other offensive weapons, and when so assembled have been aiding and assisting in running, landing, or carrying away prohibited or uncustomed goods or goods liable to duties of excise &c., or in obstructing the officers of the revenue in the execution of their office &c. And whereas several officers of the customs and excise &c. have been wounded, maimed, and some of them killed, when in the execution of their office, or otherwise, by the said dissolute persons, so associated and assembled as aforesaid, &c."

every

1783.

REX  
versus  
FRANKLYN.



1783.

REX  
versus  
FRANKLYN.

every person active and concerned in riotous proceedings of this nature should individually be armed: that, though the prisoner had denied having any concern in this outrage, he had on the contrary an affidavit, stating not only that the prisoner was at the head of the party and encouraging them, but also that he was armed; so that, even if the court should think that the statute could only affect persons, who were themselves armed, and consequently that the present commitment was defective, this application must prove nugatory; as before the writ of habeas corpus could be returned, a proper warrant of detainer should be lodged against the prisoner.

Lord Mansfield. To be sure that may be done: but the prisoner does not deny, that he was there with armed persons; and, if he was active, it is not necessary under this act, that such individual should be armed. His Lordship added, that, independent of the Attorney General's affidavit, there was no ground for this application; for the court never grants the motion, upon the merits as disclosed by the prisoner's affidavit.

Willes, Ashburst, and Buller, Justices, concurring.

Rule discharged.

### Rex v. Compton et al.

Conspiracy by parish officers and others in low situations and circumstances, to marry a poor woman, settled in one parish, to a man settled in another, is not a proper subject for an information.

Otherwise, if the delinquents are of any situation in life or of good circumstances.

COCKELL moved for an information against the defendants, overseers and inhabitants of the parish of *Doncaster* in the county of *York*, for conspiring to prevail upon a soldier to marry a poor woman of their parish, then big with child, for the purpose of throwing the burthen of her maintenance from themselves upon the township of *Kirkby* in that county, in which township her husband, the soldier, was settled.

The affidavit, as stated by Mr. Cockell, very strongly impeached the conduct of the defendants.

*Sed per* Lord Mansfield and the court.

Great inconvenience has been felt from the practice of obliging persons in low circumstances to shew cause against informations, and to come afterwards before this court from perhaps a very remote part of the country, and consequently at a great expence, to receive judgment. To be sure this appears to be a very fit subject for prosecution; but justice may effectually be done otherwise;



wife; and it will be more proper in all [a] such cases, to take the common remedy and proceed by way of indictment. [b].

Motion denied.

1783.

REX  
versus  
COMPTON.

The mayor and town-clerk of *Doncaster* were included in this application; but the court thought, that the affidavit did not sufficiently reach them. If it had, Lord *Mansfield* said, the court would have granted the rule against them.

[a] So, in the case of the *K. v. Slaughter and Batt*, the overseer and the churchwarden of the parish of *St. Mary Woolchurch Haw* in the city of *London*, upon the motion of Mr. *Sylvester*, who cited the cases in *Strange* and other more recent manuscript authorities, for an information against the defendants for conspiring to marry a poor woman of their parish to a person in the workhouse of another parish, *Buller J.* said, No such rule has been granted, since I sat here. The court has come to a resolution, not to grant informations in these cases. *E. 25 G. 3. 1785, Wednesday, April 20th.* This application was also made without effect in a very gross case, that of a man under duress married to an idiot. *Rex v. Upsdale and Winn*, overseers of the poor of the parish of *New Alresford, Hants, et al.* Upon the motion of Mr. *Jekyll*, *M. 28 G. 3. 1787. Monday, November 26, per Ashurst, Buller, and Grose, Justices.*

[b] Till a few years before this determination, as the parish in which the husband lived was by this criminal conduct of the inhabitants of the other parish deprived of all relief upon the question of settlement, if the affidavits in support of the application established the fact, the information was usually granted; except where the woman, settled in the defendant's parish previous to her marriage, was with child by the man to whom the defendants procured her to be married.

### Rex v. Inhabitants of Seagrave.

Saturday,  
Feb. 8th.

TWO justices remove *Thomas Brown*, *Ann* his wife, and their two children, from the parish of *Barkby* in the county of *Leicester* to the parish of *Seagrave* in the same county. The sessions on appeal confirm the order, and state the following case:

That the pauper was hired from old *Martinmas* to old *Martinmas*: that on *September* the 25th he told his master, he was going to be married: that his master made no answer: that he went away on *Saturday* and was married: that upon his return he had no intention of quitting his service: that the master said, he would not employ him any longer: that he said he would go, if he would pay him his year's wages: that the master refused it; and said, he would only pay him for the time he had served; and asked him if he would take his wages, or go before a justice: that the

The consent of a servant given in express terms to the dissolution of his contract, unless fraud is stated, must be conclusive.

K k

master



1783.

REX  
versus  
Inhabitants of  
SEAGRAVE.

master set out about his business to his farm at *Barrow*; when the pauper called him back, and said he would take the money for the time he had served; and *that he parted with his own consent.*

The two justices and court of quarter sessions had concurred in opinion, that, as the quitting of the service in this case appeared to be only an acquiescence by a servant in the interested commands of one who was in the habit of exercising acts of authority over him, and that the servant had submitted to a small deduction of wages only to avoid going, as he otherwise must have done, before a magistrate; this was not that free consent and contract, that ought to conclude him, and operate as a dissolution of the contract of hiring and service.

But the court thought, that the last words of the case as stated were so clear and unequivocal a dissolution of the contract, that they would not permit it to be argued.

*Per Curiam,*

Rule absolute and both orders quashed.

Vide the next case.

Saturday,  
Feb. 8th.

### Rex v. Inhabitants of Swalcliffe.

A legal order of removal is conclusive, if unappealed from: but an order of removal to a place, which does not maintain its own poor separately, is a mere nullity.

TWO justices by an order remove *Thomas Hawkins* and *Mary*, his wife, from the parish of *Swalcliffe* in the county of *Oxford* to the parish of *Stourton* in the county of *Warwick*. The sessions on appeal adjudged the settlement to be at *Swalcliffe*, quashed the order and stated the following case:

That the pauper was born at *Swalcliffe*, the place of his father's settlement. That in *January* 1782 he was removed by an order of two justices from *Swalcliffe* to *Ascott*, a large populous village, part of the parish of *Whichford*, and maintaining its poor in common with *Whichford*; to which order *Ascott* did not appeal: and the parish of *Swalcliffe* filed the order at the *Epiphany* sessions 1782 for safe custody. The pauper and his wife coming again into the parish of *Swalcliffe* and not having acquired any subsequent settlement, the overseers of *Swalcliffe* obtained the first mentioned order and sent the pauper to *Stourton*. That at *Chipping Norton* there are two statutes yearly for hiring of servants; the first is before old *Michaelmas*, and the second is always the *Wednesday* after old *Michaelmas*. In the year 1775 at *Chipping Norton* second statutes, which in that year happened to be the day after



after old *Michaelmas* day, the pauper was hired to serve *John Rous* of *Stourton*, from that day until old *Michaelmas* day 1776 for 4*l.* 6*s.* 6*d.* wages. That on the *Friday* following the pauper entered on his service and continued therein at *Stourton*, until the day after old *Michaelmas* day 1776; when the master paid the pauper his wages, and he went away. That the pauper in the year 1776 was hired by one *Matthews* at *Skipston* first statutes, which was the *Saturday* before old *Michaelmas* day, to serve the said *Matthews* at *Ascott* from *Michaelmas* 1776 to *Michaelmas* 1777 at 4*l.* 10*s.* wages, and common for one sheep; that the pauper entered on his service, and in the course of the year the master sold the pauper sixteen sheep upon credit. That the pauper continued in the service without any difference having happened between him and his master, until *Skipston* first statutes 1777, which were held on the 4th of *October* in that year: when the pauper went thither to be hired, and returned to his service early in the morning of the next day, having been out all night. The master (who had knowledge of the pauper's courting a girl) told the pauper he would have no such goings on, as lying out all night, and that he should not be a servant of his any longer: to this the pauper answered, that he was as willing to go as his master was to send him away: the master then told him, he should make a deduction in his wages. That the pauper had his whole wages paid to him excepting one shilling, at the time he settled the account with his master, which was about a week after *Michaelmas*: and he understood the shilling was deducted for lying out all night. The sessions quashed the order of justices, on the ground that the hiring, from the day after old *Michaelmas* to *John Rous* to the old *Michaelmas* following, was not a hiring for a year; and determined, that no subsequent settlement was gained at *Ascott*.

1783.

Rex

versus

Inhabitants of  
SWALCLIFFESettlement at  
Stourton.

*Howorth* and *Wooddeson* shewed cause in support of the order of sessions; and they admitted, that, under the authority of [a] the *K. v. the inhabitants of Syderstone cum Bermer*, a hiring from the day after *Michaelmas* until the *Michaelmas* following was a legal hiring for a year.

They endeavoured to support the proposition, that the shilling having been unreasonably and oppressively deducted and the

[a] E. 17 G. 3. 1777. ante, p. 19, confirmed in the case of the *K. v. Inhabitants of Skiplam*, M. 27 G. 3. 1786. 1 *Durnford and East*. 490.



1783.

REX  
 versus  
 Inhabitants of  
 SWALCLIFFE

master having otherwise an obviously interested motive for his conduct, the court might under such circumstances presume fraud, though it was not expressly stated: that acquiescence was not consent: that it had been decided in the case of [a] *Rex v. Inhabitants de Islip in com. Oxon.* that a servant had a right to absent himself for the purpose on which the pauper here went: and, if that was not the cause of turning him away, it must have been a fraud. But this point was not pressed, as they did not appear to think the ground tenable.

But they farther contended, that the order of removal to *Ascott*, being unappealed from, was conclusive as to the pauper's settlement in the parish of *Whichford*: that, as *Ascott* was stated to be a large populous village, maintaining its own poor in common with *Whichford*, the court would presume, that the pauper had been received by some person acting for the parish at large: that in the case of [b] the *K. v. Kirkby Stephen*, it was adjudged, that a parish was bound by a removal to a particular part of it: that in that case the several divisions of the parish maintained their respective poor separately: and that, if the law were unquestionably so where the interests of the several branches of the parish were separate, it must be so *à fortiori*, where they were the same: that both branches having here a common interest, the order was notice to the whole parish: that being received by any of the parish was the same thing, as if it had been received by the whole; and therefore, that as against *Whichford*, as including *Ascott*, this order was a conclusive judgment.

*Bearcroft*, in support of the rule to quash the order of sessions, insisted; that, though an order of removal, unappealed from, is conclusive, when directed to a place to which a removal can legally be made, and where there is to be found some body legally authorised to appeal, as is the case in every parish as well as every hamlet that separately maintains its own poor, yet in the present instance the order was directed to a place not of either of these descriptions, and in which there existed no officers to act: that a removal must be to such a place; a place where there are officers to receive the pauper; and who may afterwards also, if necessary, appeal: that to omit to do a thing, which was impossible to be done, could not be conclusive upon any one; and that *Whichford* could not possibly appeal in this case: for, not being parties, they were not entitled to interfere or to be heard.

[a] E. 7 G. 1. Str. 423. Cas. of Settl. 97.

[b] T. 10 G. 3. 1770. Bott. 209.



That, as to the other point, had the master said, "you shall go away, for otherwise you will be settled here;" it might be fraudulent: but that the court in stronger cases have said, the fraud must be stated: it must be clear to demonstration; they will only take notice of it, where they cannot avoid it.

1783.

*Rex  
versus  
Inhabitants of  
Swalcliffe*

Lord Mansfield, You labour a point that is abandoned. And as to the removal to *Ascott*, it was no reason for an appeal. It was in truth no removal at all. It was a mere nullity.

*Asbburst, J.* You may as well remove to a man's house.

*Willes and Buller, Justices, concurring,*

Rule absolute,  
Order of two justices affirmed, and  
Order of sessions quashed.



Easter



1783.

## Easter Term

23 Geo. 3. 1783.

Wednesday,  
May 14th.

Rex v. Inhabitants of Hope Mansell.

A petty constable, sworn into office and executing it by deputy, thereby discharges a certificate and acquires a settlement.

TWO Justices by an order remove *James Davies*, Ann his wife and their five children, from the parish of *Hope Mansell* in the county of *Hereford* to the parish of *Brampton Abbots* in the same county. The sessions on appeal adjudged the settlement to be in *Hope Mansell*, quashed the order, and stated the following case:

That *Daniel Davies*, being a certificate person from the parish of *Ross* to the parish of *Brampton Abbots* where he resided many years, during that residence had a son named *John*; which son afterwards lived in the same parish and was chosen petty constable and sworn to execute that office: that, after being so sworn; he declared he would not serve the office himself; and did accordingly employ one *James Addis* to serve it for him, to whom he gave half a guinea for his trouble. That some years afterwards *James Davis* (whose legal settlement was then in the parish of *Bridstow*) was bound apprentice by indenture to the abovenamed *John Davies* for the term of seven years in the aforesaid parish of *Brampton Abbots* and duly served the said term. That the said *James Davis*, the pauper, was removed by an order of two justices from the parish of *Hope Mansell* to the parish of *Brampton Abbots*, upon a supposition that he gained a settlement there by such apprenticeship; to which order the parish of *Brampton Abbots* appealed. This court, considering the matter, is of opinion that the aforesaid *John Davies* though chosen and sworn into the office of petty constable, but not having himself executed the same, did not gain a settlement.

Settlement at  
Brampton  
Abbots.



a settlement in the said parish of *Brampton Abbots*; and consequently that the said *James Davis*, the pauper, did not gain a settlement in the same parish by means of such apprenticeship.

*Bearcroft* and *Phillipps* shewed cause in support of the order of sessions: and they stated the question to be, whether according to the true construction of the statutes 3 *W. & M.* [a] and 9 & 10 *W.* [b] the pauper's master's certificate subsisted, at the time the pauper served his apprenticeship; or had been previously avoided by his having executed the office of petty constable by deputy and under the circumstances stated in the case? And

*Bearcroft* contended, that, though the latter of these statutes, which respects certificated persons, enacts, that they may acquire a settlement by *executing* an annual office, yet the former act, which was a general one, required that the office should be executed by the party intitling himself, *for himself and on his own account*: that, these acts being in *pari materia*, the latter must be referred to the former; that in this view it was obvious that executing the office by deputy would not satisfy the express words of the legislature; and that nothing less than a *personal* discharge of its duties could give a settlement.

That such an execution of the office could not be considered as giving a title to a settlement without doing as much violence to the spirit of the poor laws in general as to the letter of this particular statute: that this as well as many other modes of acquiring settlements were merely substitutes for notice to the parish, which the law otherwise would require: that the principle therefore was notoriety to the parish: and that, unless the party served the office in person, there could not possibly be that notoriety; for that the petty constable was not chosen by the parish, but at the leet, of which the parish had no notice.

Mr. *Bearcroft* also contended, even if the court should be of opinion, that the discharge of the duties of this office by deputy was sufficient to satisfy the statute, that still it ought to appear that the whole of those duties had been discharged and throughout the whole of the period during which the officer was bound to perform them: that it had been adjudged, in the case of [c] the *K. v. the Inhabitants of Fittleworth*, that an execution of the office for the space of a whole year was necessary to give a settlement;

[a] c. 11. s. 6.

[b] c. 11. s. 1.

[c] M. 18 G. 2. 1744. Burr. Settl. Cas. 238; 1 Will. 81. S. C.

and

1783.

REX

versus

Inhabitants of

HOPE MAN-

SELL.



1783.

REX  
versus  
Inhabitants of  
HOPE MAN-  
SELL.

and that it did not appear upon the case when and how early in the course of his year the pauper employed the deputy, or whether such deputy did or did not discharge the duties of his office.

But upon this point the court thought, that the same strictness is not to be observed in construing orders of justices as is used in convictions; and that they will not doubt of facts, of which it appears that the sessions had no doubt. [a].

*Phillips* contended, that the pauper's master had not avoided his certificate, the execution of the office not having been such, as the acts of king *William* require: that the very terms of the acts of parliament as well as the general principles of the poor laws demonstrate, that the execution of this office must be personal: that the words of the first act were "If any person, who shall come to inhabit in any parish": that these words were strictly personal; and that there was no pretence to say, that a man could gain a settlement under these words by any representation, by the inhabitation of his wife and family without himself: that these words are immediately followed by "shall for himself and on his own account execute:" and, being so connected with the former, seem to shew that the legislature meant to pursue the same idea of personality: and that the continuance of the party in office during a whole year, which the same clause required, farther favoured the same idea: that this, which bore the title of an explanatory act, must be taken according to the natural import of the words, and will not admit of a latitude of construction: that the case of an explanatory law was one of the last in which it would be permitted to resort to artificial reasoning and legal fictions; such as the doctrine of *qui facit per alium, facit per se*: that, as in every other instance the gaining of a settlement is personal, it ought still to be more so, when done by such means as in the present instance, by the means of avoiding a certificate; because it was the object of [b] the latter of these acts to increase the difficulty in such cases: that a settlement is considered as a reward by the parish for the benefit of the pauper's labour, a recompence for the services he has performed: that it is so adjudged

[a] Vide the next case, *Rex v. the inhabitants of St. Nicholas, Gloucester*.

[b] *Dennison, J.* in *Rex v. Fittleworth*, Burr. Settl. Cas. fo. 242.



in the case of [a] the K. v. the Inhabitants of *Christchurch*: that in direct contradiction to this maxim, by a residence in any other place and consequently without any recompence to the parish, if the doctrine of deputing were to prevail, the difficulties thrown by the legislature in the way of certificated persons, aiming at settlements, would be removed, and a door to great fraud opened.

1783.

REX  
versus  
Inhabitants of  
HOPE  
MANSELL.

That a petty constable is not such an officer, as is by law authorized, [b] unless under particular circumstances, to appoint a deputy: that it is laid down in [c] *Hawkins*, that "a constable may appoint a deputy to execute a warrant directed to him, when by reason of sickness or otherwise he cannot do it himself:" and that the reason assigned is, that otherwise there would be a failure of justice; and he adds, "that he does not find that it is settled, that without such special cause a constable can make a deputy:" that in *Sir Walter Vane's* case it was holden by *Keeling Ch. J.* and *Windham*, that a constable cannot make a deputy; and that the justices at sessions did wrong in allowing it; for they only make a servant, but a deputy as such must be sworn and act for himself as well as the constable; and that in this case as reported in [d] *Keble* and *Siderfin* the authority of [e] *Phelps v. Winchcombe*, which is there stated to have been cited from *Moor* and *Rolle*, was by these judges denied to be law, as to a constable's general power of making a deputy: and that it was agreed by the court as stated in *Siderfin* that, where a woman, under a custom that this office shall be served by rotation of houses, is called upon, she may appoint one to serve for her; and that he who is to serve is sworn and is the constable and not a deputy: that it seems to follow from hence, that, where it is not perfectly clear that an officer has a power to depute and where that officer is sworn, the acts of his unsworn deputy cannot by any relation be said to be his acts.

[a] E. 33 G. 2. 1760. by *Wilmot J.* Burr. Sett. Caf. fo. 498.

[b] The general power of making a deputy in this case as well as in that of an overseer is very fully discussed in the case of the K. v. *Alice Stubbs and Others*. E. 28 G. 3. 1788. *Durnford and East* 2. 395.

[c] 2 P. C. 62.

[d] H. 19 & 20 Car. 2. 1667. 2 Keb. 309. 1 Sid. 355. Vide also 1 Lev. 233. S. C.

[e] M. 13 Jac. Moor 845. 1 Roll. Abr. 591.



1783.  
 ~~~~~  
 REX
versus
 Inhabitants of
 HOPE
 MANSELL.

That it never has been before supposed that any but the person, visibly and publickly executing the office, could gain a settlement by it; and that the only question hitherto made upon the subject has been, whether such person, acting for another, could himself gain a settlement? that, the court held, he could not, as not executing it on his own account: that still less ought the principal to have this advantage without any execution at all: that Lee Ch. J. at the time he delivered the judgment, of the court in the case cited of *R. v. Fittleworth*, said, "my opinion on the act [a] is this, that the meaning of the words unless he shall execute some annual office in such parish &c." is; that, "unless he does that service, which is a performance of this requisite, which the act prescribes &c, he does not gain a settlement:" that his lordship had before said in this case, that "the reason for the settlements given under this title to certificate men was [b] for the reward of their service:" that to employ another and that probably in his own absence, could never be that execution of his office or performance of service, which was meant by the legislature to give such an officer a claim to the reward: that if every other title to a settlement was founded upon a personal performance of the requisites, that if a man could not reside for 40 days or come into a parish to settle on a settlement of 10 l. a year by representation, if he could not be hired for a year or bound as an apprentice by deputy, if these acts could not be done for him by another, much less ought that act; which the very terms of the statute require that he must do "for himself:" that the authority of the case cited, with respect to the necessity of a personal service to entitle the officer, had governed a subsequent case, that of [c] the *K. v. the inhabitants of Christchurch*: and that, if Lee Ch. J. should have thrown out any dictum to the contrary in a more early [d] period than the determination of the *K. v. Fittleworth*, the court would pay very little regard to that, when set in opposition to the solemn and deliberate determination in the latter case.

[a] 9 & 10 W. 3. c. 11. § 1.

[b] Upon this subject see the *K. v. the inhabitants of St. Giles's, Reading*, Tr. 18 G. 3. 1778. ante fo. 56. and note thereon.

[c] Tr. 27 & 28 G. 2. 1754. Burr. Sett. Ca. 365.

[d] E. 8. G. 2. 1735. Rex v. the inhabitants of St. Maurice in Winchester, Burr. Sett. Ca. fo. 29, 34.

He also observed, that if these acts in *pari materia* were not considered as one law, if, contrary to its preamble, the latter statute was to be taken as a new and not [a] an explanatory one, the mere entering upon an annual office, after having been legally placed in it, would entitle to a settlement: that in the *K. v. Fittleworth*, Lee Ch. J. had urged this argument with the same view; that it was the former act alone, that required an execution *throughout the year*: that merely to have been invested with the office or even to have executed it in a single instance could never be such a service to the parish, as could be meant to intitle to such a reward: that such an idea, though it was the clear construction of the act if considered separately and apart, had never yet been insisted upon; and consequently that the universal sense must have been, that the two acts together formed one system of law upon the subject.

Allen in support of the rule to quash the order of sessions insisted; that, with respect to the first point whether a constable may appoint a deputy, the distinction was, that ministerial offices may be executed by deputy, but that judicial offices cannot: that it is said in the very passage that had been cited [b] from *Hawkins*, that "the office of a constable is *wholly* ministerial, and *no way* judicial:" that this distinction is adopted by Coke, Ch. J. in the case of *Phelps v. Winchcombe* as reported in [c] *Bulstrode and Rolle*; and that it is there holden, as it is also laid down by Lord Hale, [d] that a constable may appoint a deputy: that all the authorities agree that for a *special cause* he may make one; and that it is by no means a necessary consequence that he cannot *generally* depute: that in the case of [e] *Peak v. Bourne* it is decided that a parish clerk may depute; and the court in delivering their judgment give the present case as another instance of a similar power: and that in the case of [f] *Medburst v. Waite* the court

1783.

REX
versus
Inhabitants of
HOPE
MANSELL.

[a] It is, in express terms, explanatory only of the St. 8 & 9 W. c. 30. without any general reference, or reference to St. 3 W. & M. c. 11. s. 6., the act in question.

[b] P. C. 62.

[c] M. 13 Jac. 1. 3 Bulstr. 77. 1 Roll. Rep. 274.

[d] H. H. P. C. 88.

[e] M. 6 G. 2. 2 Str. 942. but this case, and the opinion of Lord Hale as well as every other case cited, appears to have been founded altogether upon the authority of *Phelps v. Winchcombe*; the decision of which case could by no means establish the *general* power contended for; as it was the case of a deputation made by a constable, *when sick*, and for a purpose, clearly *ministerial*. It is also stated by the reporters in general to have been adjourned; and by Bulstrode to have been compromised, and that no judgment ever was given.

[f] M. 2 G. 3. 1761. 3 Burr. 1259.

1783.

~
 REX
 versus
 Inhabitants of
 HOPE
 MANSELL.

held, that a high constable (though taken to be in some respects a judicial officer) might make a deputy to do ministerial [a] acts.

That, with respect to the second point, whether a constable executing his office by deputy avoids his certificate and acquires a settlement, it was [b] a maxim, that the court would lean in favour of settlements: that though there was no direct authority upon the subject, the principle had been established in many cases; that what a man does by deputy is to every intent and purpose the same thing as if he did it himself; that there could be no reason why this should be the only exception to that general rule: that the meaning of the legislature, in using the words "for himself and on his own account" in St. 9 & 10 W. 3. was to prevent a deputy from gaining a settlement: that it had been adjudged in the cases of [c] the inhabitants of *Lothsome v. Sheriff Hales*, and [d] the *K. v. the inhabitants of Winterbourn*, that a deputy constable, executing the office, does not thereby acquire a settlement: that, if the duties of that office are performed, the performance of which was intended to give a settlement in the parish thereby benefited, this right must fall somewhere; and, that it seemed to follow of course, that if it did not upon the deputy, it must upon the principal: that otherwise, though a service was done and a recompence intended, no recompence could be had; and the maxim that settlements are to be favoured would be totally and strangely reversed.

That it has been said, that notoriety is the principle [e] upon which the several modes of acquiring settlements, subsequent to [f]

[a] But the power claimed here is to depute *generally* and for *all* acts. In such a case there is an instance in which the legislature have interfered: for by St. 1 W. & M. c. 18. s. 7. it is provided, "that if any person dissenting from the church of England shall be chosen or otherwise appointed to bear the office of high constable or petit constable, &c. and such person shall scruple to take upon him any of the said offices in regard of the oaths, &c. every such person shall and *may* execute such office or employment by a sufficient deputy, &c."

[b] Tho' this has been generally so received, it does not any where appear to have been so established upon any clear and satisfactory principle; neither has it at all times and universally been adopted. It seems, that the maxim ought only to obtain in particular cases, and that the sounder and better reasoning is that of Lord Ch. J. Raymond, M. 1 G. 2. 1727. Bott. fo. 291. "I do not see why the statutes are to be construed in the favour of settlements, when such construction may do a prejudice to other people, and no service to the pauper, who certainly is no vagrant, but has a settlement somewhere."

[c] MSS. Cas. Hil. 6 Ann. Vin. Abr. 19, 379.

[d] H. 4 G. 3. 1764. Burr. Settl. Cas. 520. See also 1 Bl. Rep. 452.

[e] In the case of a certificate man, the certificate does not amount to a notice in writing. Lord Hardwicke in the *K. v. St. Maurice in Winchester*. Burr. Settl. Cas. fo. 29. E. 8 G. 2.

1735.

[f] c. 17. s. 3.

ft. 1. *Ja.* 2. are founded, and consequently that personal service is here an indispensable requisite; but, if this were so, if the settlement depended altogether upon that degree of notoriety which must arise from the execution of the office, it could never have been decided, that a settlement could not be gained by a deputy: that the ft. 9 & 10 *W.* 3. does not require a personal service: that the words are merely "*execute* some annual office:" that it is a new law, and, as such, to receive its construction from itself, and not to be interpreted by reference to the peculiar wording of any other act; and that it is not explanatory of ft. 3 & 4 *W.* 3.: that it was expressly so adjudged in a case [a] between the parishes of *Burclear* and *Eastwoodhay*; and in the *K. v. St. Maurice in Winchester*, as stated in *Bott. fo. 346.*: that in the same case, as stated in *Burr. Lee J.* adds, that the unanimous judgment of the court in the *K. v. Burclear* was well founded; "for the act enlarges the certificate man's power of gaining a settlement, for now if he executes such an office by deputy he gains a settlement, whereas by 3 & 4 *W.* & *M.* he was to execute it for himself and on his own account:" that no sound reason could be opposed to this construction; for, altho' the office was executed by the deputy, it was the principal that was responsible to the parish; and, that it was in conformity to one of the first general principles upon which the doctrine of settlements was built, that, as the parish derived a benefit by being eased throughout this year of the burthen of this office, the person by whose means they were so relieved was intitled to his recompence; and that the law had said, the equivalent was his settlement.

That, tho' notoriety might be the true principle, there was not, as had been contended, any want of legal notoriety in this case; for that, in contemplation of law, the parish must be taken to be present at the leet, where they owed their attendance; and consequently that the principal must have been placed in his office with the privacy of the parish.

Willes, J. Two statutes are made the subject of doubt here; the stat. 3 & 4 *W.* & *M.* and 9 & 10 *W.* 3. This last is the act more immediately applicable to the present question. One point I lay out of the case, whether a constable may make a deputy? Most of his acts are ministerial, and as to ministerial acts he certainly may.

1783.

REX
versus
Inhabitants of
HOPE
MANSELL.

[a] E. 5 G. 1. 1 Str. 163.

1783.

REX
versus
Inhabitants of
HOPE
MANSELL.

This is so settled in *Medburst v. Waite*: and the cases cited of [a] the *K. v. inhabitants of Alcannings* and Sir *Walter Vane's* cases were considerable authorities in support of the general power. The words also of the st. 3 & 4 *W. & M.* seem to imply that this office may be executed by deputy. The act, by restricting the right there given to those who execute the office "for themselves," rather supposes, that, unless this restriction had been interposed, they would have intitled themselves, if they had acted "for others." But that will not intirely govern this question; as there is behind a considerable [b] doubt, how far this statute can be connected with st. 9 & 10 *W. 3.*, by which the settlement in the present instance is given. Had it not been for the authority of *Lee Ch. J.* in the case of the *K. v. Fittleworth*, I should have thought that the latter statute had been a new, and not an explanatory, law. [b].

To

[a] H. 9 G. 3. 1769. Burr. Settl. Cas. 634.

[b] The authorities are not only far from being uniform with respect to the reference of the latter of these statutes, the Certificate Act, to the former under which a settlement is gained by serving an office; but there has also been much difference of opinion, whether the Certificate Act ought to be construed with relation to the st. 13 & 14 Car. 2.; under which the power is given of removing persons, coming to settle in a tenement under the yearly value of ten pounds. But, tho' there are to be found some dicta of a late date, that seem to shew that this question is still unsettled, yet in the case of the *K. v. the inhabitants of Duns Tew*. Tr. 29 & 30 G. 2. 1756. this point received a solemn determination agreeable to the intimation of opinion by Mr. Justice Willes in the present case; and that the Certificate Act was not there to be construed with reference to the 13 & 14th of Car. 2., but as a new, and not an explanatory law. And this decision was subsequent to that of the *K. v. Fittleworth*, which was in M. 17 & 18 G. 2. 1744. Vide the case of *Rex v. the inhabitants of Fillongley*. M. 27 G. 3. 1786. Appendix, p.

It seems proper in this place to give a view of the clauses of the three statutes, upon which these questions arose.

By st. 3 *W. & M.* c. 11. s. 6. "If any person, who shall come to inhabit in, &c. shall, for himself and on his own account, execute any public annual office or charge in &c. during one whole year, or shall &c., then he shall be adjudged and deemed to have a legal settlement &c., tho' no such notice in writing be delivered and published, as is hereby before required."

By st. 9 & 10 *W. 3.* c. 11. s. 1. "No person &c. who shall come into any parish by any such certificate as aforesaid shall be adjudged by any act whatsoever to have procured a legal settlement in such parish, unless he shall really and bona fide take a lease of a tenement of the YEARLY* value of ten pounds, or shall execute some annual office in such parish, being legally placed in such office."

By st. 13 & 14 Car. 2. c. 12. s. 1. "Upon complaint made by the churchwardens &c. to any justice &c. within forty days, after any such person or persons [i. e. poor people who are rambling from one parish to another] coming so to settle as aforesaid in any tenement under the yearly value of ten pounds, any two justices may remove, &c."

* It is very singular, that this word should be omitted by almost all the approved Editors of the statutes, as by Cay, Pickering, Ruffhead and Runnington & by Mr. Bott in his extracts of statutes prefixed to his decisions upon the poor laws, p. 36. Edit. 1773; altho' the marginal abridgment in every one of these works states, that it must be the taking of "a lease

of

To be sure there can be no doubt, but that the holding and legal serving of an office was substituted in lieu of 40 days notice: but the pauper is here sufficiently announced to the parish in his character of constable by being chosen at the leet and sworn into his office. An office, conferred so publickly and in a place where it was also the duty of the parish to attend, could not fail of being a matter of notoriety. It is this notoriety and the credit derived from being in so public a station, that form the principal grounds upon which the officer's settlement is founded: and therefore I do not agree with what was said by *Lee Ch. J.* after he had given the judgment of the court in the *K. v. Fittleworth*; that the settlement was meant as a recompence for the performance of that service for the space of a year, which is the requisite the act prescribes. At least the *personal* service is not in my opinion an indispensable requisite. I think on the contrary, that this act ought to receive a liberal construction: and so it is adjudged in the *K. v. Burclear* [a].

1783.

REX
versus
Inhabitants of
HOPE
MANSELL.

The question then comes to this, whether this man, having been appointed and sworn in and having paid another person for discharging the duties of the office, shall be considered as having *executed* the office within the meaning of the statute? Now it is clear, that, if the principal does not gain a settlement, the deputy cannot: but, tho' the deputy does not, you must resort to a very different kind of reasoning to shew that the principal cannot. I find nothing which compels me to say, that it is necessary, that this man should have served the office in person. On the contrary the general maxim of the law is, *qui facit per alium, facit per se*; and the burthen of the execution has certainly lain upon this man.

As to the authorities, had the case of the *K. v. Fittleworth* been directly in point, we should have holden ourselves bound by it: but there the officer was removed in the middle of the year, and

of a tenement of the value of ten pounds *per annum*;" and altho' in *Cay, Ruffhead* and *Runnington* this act is stated to have been examined with the record. The general understanding amongst lawyers and the uniform practice of near a century has certainly been in contradiction to this reading and in conformity to the sense suggested in the margin; and this word is retained in the edition of the continuator of *Keble*, *Mr. serjeant Hawkins*, *Bill* and the executrix of *Newcomb*, *King's printers*, and the assigns of *Richard* and *Edward Atkins*, esquires, in 1706, and also in the black letter copy, printed at the time (1697) from the original record in the hands of the clerk of parliament by *Bill* and the executrix of *Thomas Newcomb*, *King's printers*.

[a] Vide *Probyn* and *Lee J.* in the case of *Rex v. inhabitants of St. Maurice in Winchester*. E. 8 G. 2. 1727. *Burr. Settl. Cas.* fo. 29, 34.

consequently

1783.

REX
versus
Inhabitants of
HOPE
MANSELL.

consequently there was no execution of the office for a year either by deputy or in person. I therefore think this an execution of the office within the act.

Buller, J. As to the objection in point of form, besides the general answer that has been given, if the deputy appears to have been paid, I should presume the whole work was done.

With respect to the merits, the authorities cited strongly favour the general power [a] of deputing. In the *K. v. Allcannings* [b] the court asks "Who is benefited by the service of the deputy?" "Why the principal." And the reason given is, "because it discharges the principal from serving the office again." After such service he certainly cannot be called upon again, until it is his turn. And the parish as well as the party is benefited by the service; as otherwise the burthen must have fallen upon some one of their number. The office having then in fact been supplied and that by the means of the principal, with the knowledge and to the advantage of the parish, the service of the deputy is the service of the principal; and, if the contrary were holden now, neither the one nor the other would gain a settlement: for it is clear that the deputy does not. The whole reasoning therefore of the cases, that establish this, goes strongly with the argument, that the principal may.

Rule absolute.

Order of Sessions quashed.

Lord Mansfield and Lord Commissioner
Asheurst were absent.

[a] It seems to have been assumed as a settled point, both upon the bench and at the bar, in the *K. v. Clarke*. E. 27 G. 3. 1787. Durnford and East, fo. 682, 89., generally that a constable may depute.

[b] Bott. 340.

Saturday,
May 17th.

Rex v. Inhabitants of St. Nicholas, Gloucester.

Profits of
a weighing
machine
house are
rateable to
the poor.

TWO Justices allow a rate made for the relief of the poor of the parish of *St. Nicholas* in the county of the city of *Gloucester*, by which the mayor and burgesses of that city are assessed for their *machine house* in the said parish.

Upon the appeal of the mayor and burgesses, alledging that the profits of the machine, (which were estimated at about 40% a year

a year and constituted the greatest part of the charge, the house being only of the annual value of 5 *l.*) were not a legal object of taxation, the sessions order, that "the said rate be amended; and "that the said machine house be rated at and after the rate of 5 *l.* "and no more; because they are of opinion, that the profits arising from the said machine ought not to be rated towards the "maintenance of the poor of the said parish:" and they stated the following case:

That the mayor and burgeses of the city of Gloucester, about five years ago, were possessed of and entitled to a house, in the parish of St. Nicholas in the city of Gloucester; and, being so possessed and entitled as aforesaid, they erected a machine in a street leading by the said house, for the purpose of weighing waggons, carts, &c. with coal and other things; and have since demanded and received of and from the owner of every such waggon, cart, &c. so weighed as aforesaid, the sum of two-pence in the ton for every ton, the things, contained in the said waggon, cart, &c. so weighed as aforesaid, amounted to. That the steel-yard, part of the said machine by which the said waggons, carts, &c. were weighed as aforesaid, was and always has been in the said house of the said mayor and burgeses in the parish of St. Nicholas aforesaid; and that the said house is called *the machine house*. That the said mayor and burgeses have no right to compel the owners of waggons, carts, &c. loaded with goods as aforesaid, to bring their said waggons and carts, &c. to be weighed at and by the said machine. That the said house, called The Machine House, independent of the profits arising from the said machine, is worth about 5 *l.* That the profits arising from the said machine are about 40 *l.* per annum. And that the said machine house stands rated to and upon the rate of the parish of St. Nicholas in the following manner, viz. the mayor and burgeses of Gloucester for a machine house, 24 *l.* 1 *l.* 16 *s.* 0 *d.*

Bearcroft shewed cause in support of the order of sessions, which, by amending this rate, had exempted the weighing machine from taxation. He stated, that the form of the rate was, "The machine house;" and that the rate itself charges nothing else and does not describe the machine as being part of the house: and insisted, that, the sessions having an undoubted right to decide all facts, and having stated it as clear that the house itself is only worth five pounds per annum, the single question was, whether the ma-

1783.

REX
versus
Inhabitants of
St. Nicholas
GLOUCESTER.

1783.

REX
versus
Inhabitants of
St NICHOLAS
GLOUCESTER.

chine was part of the house? and consequently that the court, before they proceeded to quash the order of sessions, must see clearly that on the facts stated they have formed a wrong judgment: that it does not appear upon this case, that the machine is *part* of the house: that this is by no means a necessary consequence of its being *in* it: that it is not even stated to be fixed to the freehold: that, even if it were let into the ground of the street before the house and so were part of the freehold, it was still no part of the house: but that to make out the case on the other side, they must connect it with the house: that it cannot be said to be appurtenant to it; for it only hangs over the way.

Buller, J. If the street, so built upon, is no part of the appurtenances, by what right do the corporation erect the machine there?

Bearcroft. They are owners of the soil.

Buller, J. If so, they have allotted some of this soil, as forming a necessary part of one whole, to this useful and lucrative purpose.

Mr. *Bearcroft* then contended, that, as the rate here was made expressly upon the house and the house only, it could not be necessary to argue, whether the profits of the machine were, as personal property, proper objects of taxation: that, if it were, the court had, uniformly in questions of this sort been governed by the usage of the place; that with respect to this particular machine, its recent introduction excluded the possibility of usage: that the case did not state any instance of any similar machine having ever been rated in any other place; and that it would be extremely dangerous and even ruinous to trade to encourage any such attempt; as upon the same principle the profits of [a] weaving machines and of every other mechanical invention, by means of which the preference given to our manufactures was principally insured, must necessarily be subjected to taxation.

Lee, Solicitor general, and *Clifford*, in support of the rule to quash the order of sessions, insisted; that, if property of any character or denomination is, by any collateral circumstance or appendage, made more valuable than such property in general is, there can be no reason that it should not be charged to every pub-

[a] The case of the *K. v. Hogg*, E. 27 G. 3. 1787. is so directly applicable to the present, that I have thought fit to insert it in the body of this work. See the next case.

lic burthen to the extent of its clear profit; whether that profit arises from a payment, voluntary or compulsory: that the clear profits of lead mines, received without risque by the lessor, had in the case of [a] *Rowls v. Gell et al'* been holden liable: that the profits in the present case came within the same rule: that the point, which had been made respecting the general rateability of *personal* property, could have no place here, as in the city of Gloucester by a local statute that property was rateable: that no other question, than whether a property, circumstanced as the present, was exempted from the general rateability of property, had been made below, or was meant to be submitted to the judgment of this court: that, from despair upon the merits, recourse was now had to an objection, that at most went to a restating of the case; but that there was no pretence for it: that the steel yard was stated to be in the house, and therefore that the engine and the house were substantially the same thing, or at any rate the component parts of one and the same thing: that they were applied to one and the same purpose, and the one absolutely necessary to the other in point of description, use and profit.

They also contended, that this produce or profit was liable to be rated as toll: but the court held clearly, that it was not; for that the case stated, that it was optional in the owners of carriages, whether they would weigh or not: and that, though they passed over the foil, there was no obligation upon them to use the machine: but that toll was a compulsory payment.

Lord Mansfield. It is not in terms said, that the machine is annexed to the freehold; but the nature of the thing supplies the defect in the expression. Indeed the expression sufficiently shews it. What is the house? It is, "The Machine House." They are one intire thing, and are together rated by the common known name, which comprehends both: and the principal purpose of the house is for weighing. The steel yard is the most valuable part of the house: The house therefore, applied to this use, may be said to be built for the steel-yard, and not the steel-yard for the house. And the quantum of the assessment must be allowed to be most moderate; as, although a liberal allowance ought to be made for wear and tear, labour and attendance, the charge does not much exceed the half of the value.

Willes, J. There does not seem to have been any doubt below but that the machine was, as it is described in the rate, appurte-

1783.

REX

versus

Inhabitants of
St NICHOLAS
GLOUCES-
TER.

[a] E. 16 G. 3. 1776. Cowp. 451.

1783.

REX

versus

Inhabitants of
St Nicholas
Glouces-
ter.

nant to the building. If so, its clear profits are undoubtedly rateable. If a billiard table stands in a house, and the house should, in respect of such table, let at a higher sum, it is rateable, while the table continues there and it is so let, at the advanced rent.

Buller, J. The conclusion of this case is strong to shew, that the justices considered [a] the machine as part of the house; for the question they raise, the point they bring forward and refer to the court is, whether the profits are rateable? And, so long as they are received, they undoubtedly are. It is like the case of [b] the *Cheltenham Spa*. There is an extraordinary profit arising from this modification of the enjoyment. The only question therefore is, whether a man shall be rated for the property he has? If a house to day is let for 30*l.* per annum, and to-morrow if turned into a shop, would let for 50*l.*, when it is turned into a shop, it shall be rated at 50*l.* Its being called the Machine House shews, that the house and machine are an entire thing. The machine is also the principal thing.

Lord Commissioner *Ashburst* was absent.

Rule absolute,

Order of sessions quashed,

and order of justices, allowing
the rate, affirmed.

[a] See the last case, *Rex v. Inhabitants of Hope Mansell*. p. 252.

[b] *Tr. 17 G. 3. 1777. Cowp. 619.*

Rex v. Hogg.

[Easter Term 27 Geo. 3. 1787.]

A house with
a carding en-
gine in it, de-
scribed in the
rate as an en-
gine house and
both let and
occupied to-

“ TWO Justices allow a rate made for the relief of the poor
“ of the township of *Ribchester* in the county of *Lancaster*.
“ The sessions holden at *Midsummer* 1786, in the town of *Pres-*
“ *ton*, upon the appeal of *John Hogg* confirm the rate, and state
“ the following case:

gether, tho' it does not appear whether the engine is fixed to the building, is considered as an intire subject, and to the extent of their annual value are properly so rateable to the poor. Local usages do not controul or affect the construction of acts of parliament.

“ *John*

“ *John Hogg* was rated to the relief of the poor for a building,
 “ called the Engine-house; which consists of a bay of building
 “ about 18 feet long and 19 wide, in which there is a carding
 “ machine for manufacturing cotton. The engine is *not fixed to*
 “ *the premises, but capable of being moved at pleasure.* The build-
 “ ing, independent of the machine, is worth only two guineas *per*
 “ *annum*; for which the appellant is willing to be rated. The
 “ building and machine together are rated at 36 l. *The usage of*
 “ *the town of Ribchester has been not to rate personal property.* The
 “ respondents insist, that this carding machine is rateable; and
 “ the sessions, being of that opinion, confirm the rate.

“ This case came before the court of *King's Bench* in *Hilary*
 “ term 1787, when the court directed it to be restated, and an-
 “ swers to be returned by the court of quarter sessions to the fol-
 “ lowing queries :

“ Whether the engine mentioned in the said order is worked
 “ with water or with horses ; and whether the house wherein the
 “ said engine stands is a dwelling-house, or built for the purpose
 “ of receiving the engine ; and whether it is used for any other
 “ purpose than working the engine ; and in what manner the en-
 “ gine is put up in the engine house ; and what is its size and
 “ bulk : and also whether the owner of the building has con-
 “ tracted to discharge the occupier of all taxes ?

“ At the ensuing *Easter* the court of quarter sessions made the
 “ following return :

“ The counsel on both sides do consent to the following facts in
 “ answer to the order of the court of *King's Bench* ; viz. that the
 “ engine therein mentioned is *generally worked with water*, but
 “ frequently by the hand. That the building, wherein the said
 “ engine stands, is *not a dwelling house*, nor was it erected for the
 “ purpose of receiving the engine ; but formerly was used for the
 “ purposes of turning bobbins, and as a weaver's shop : but is now
 “ used for the purpose of carrying on the cotton manufactory,
 “ there being in the same building two other engines, besides the
 “ engine before mentioned, worked as aforesaid ; one of which is
 “ also used for the purpose of carding, and the other for tum-
 “ ming cotton, which tumming is another process of the same
 “ manufactory. All the engines are *placed on the floor, and no ways*
 “ *annexed or fastened to the same ; but may be moved at pleasure* and
 “ carried out and worked in any other place, either by means of
 “ water

1787.

REX
versus
HOGG.

Saturday
May 12.

“ water or manual labour, and are not adapted to any parti-
“ cular building. The frame in which the engine stands is
“ twelve feet in length, three feet eleven inches in breadth, and
“ two feet nine inches in height: the semidiameter of the
“ largest cylinder with a small roller at the top rising twenty in-
“ ches above the frame; the engine sinking in the frame seven-
“ teen inches. *Leonard Walmsley* is the lessee of *the premises* under
“ the owners, and is subject by his lease to discharge *the premises*
“ of all taxes; and *Hogg*, the appellant, is his subtenant, but
“ *Walmsley* pays the taxes.

“ And now *Caldecott* shewed cause in support of the order of
“ sessions, confirming the rate; and insisted, that, though the case
“ now returned was by no means a full and satisfactory answer to
“ the questions proposed and the most material point of inquiry
“ was contrived to be eluded, yet enough was stated to enable
“ the court under a direct authority to adjudge this a species of
“ property, rateable to the poor: that it was such

“ 1. As being a house, consisting of the building and engine,
“ and together forming one undivided subject, of the same de-
“ scription, use and character.

“ 2. As the engine itself, independent of the building, was a
“ visible, local, personal property, producing a certain annual
“ profit, without adventure of any kind.

“ 1. That this property was rated by the name of the *Engine*
“ House: that the case stated, that the engine was *in the house*:
“ that it was of such a bulk and extent, as to occupy two thirds of
“ the house in length: that it was not a dwelling house; and that
“ the only uses to which it had ever been applied were of a na-
“ ture similar to the present, and merely as a case for machinery of
“ this sort; as a weaver's shop: and that the shell was worth only
“ 2 l. a year, and the engine 34 l.

“ That as they were both thus substantially the same, the finding
“ did not any where negative their being literally so: that it
“ only said, that the engine was no ways annexed or fastened to
“ *the floor*: that it might therefore in many different modes be an-
“ nexed to other parts of the building: that as it was found to be
“ “generally worked with water” the wheel must in some sort
“ have been fastened to the wall: and that, if worked with water,
“ it was in the nature of a mill; and that mills have, as one thing
“ with the building that contained them, been adjudged rateable.

That

“ That in the contract between the parties the original lessee is
 “ stated to be the lessee of *the premises*, and subject by his lease
 “ to discharge *the premises* from taxes: that the premises must
 “ mean the engine house altogether, as described in the rate: an
 “ intirety; and not the machine separate from its case, or the case
 “ from the machine. 1787.

1787.

REX
 versus
 HOEG.

“ That agreeable to the sense of the owners of this property and
 “ upon this general principle was the reasoning of the whole court
 “ in the case of [a] the weighing engine: that also it did not appear
 “ any where in that case, that the engine was *part* of the house,
 “ but only that it was *in* it: that this omission was then insisted
 “ upon in argument; but that the court adjudged that property
 “ to be rateable; Lord Mansfield saying, “ that the nature of the
 “ thing supplied the defect of the expression:” that this case was
 “ therefore in point.

“ That with respect to the arguments *ab inconvenienti* and the
 “ consequences of such a decision, there was not a pretence to con-
 “ sider this as a tax upon labour, or that it could in any new and
 “ improper way affect the mechanic or manufacturer: that the
 “ labouring poor hire these engines of the wealthy; and, if as oc-
 “ cupiers they pay this charge, they hire the engine at an easier
 “ rate: but the labouring hand is then left in the same situation
 “ with that of every other labourer: that in all cases they find their
 “ own tools; and where a mechanical discovery enables one hand
 “ to do the work of numbers, if, whatever he pays, an equal pro-
 “ fit remains to the workman, the price of labour is where it was.
 “ But that the case in direct terms excludes any such reasoning here;
 “ as it expressly finds that the occupier, the manufacturer, does
 “ not pay the rates, but that they are paid by his immediate
 “ lessor.

“ That it is said by Buller, J. in the case of [b] *Atkins & al. v.*
 “ *Davis & al.*, that “ carrying water from the pump in carts, if a
 “ profit is made, would subject the carrier to be rated to the ex-
 “ tent of those profits:” that this might be said to be a tax upon
 “ labour; but that, if a man were to build carts, and let them out
 “ to others to carry, and by such dealings make a large profit, the
 “ charging of such a proprietor could not in any view be consider-

[a] See the last case.

[b] Tr. 23 G. 3. 1783. post. 315.

1787.

REX
versus
HOGG.

“ed as the taxing of labour: that such was precisely the present
“case: it was as the tax upon the cart and not the carrier, upon
“the profits of a mechanical instrument and not the earnings of the
“mechanic. Farther, that nothing could be more evident, and
“intuitively clear, than that these engines from their nature must
“unavoidably introduce a numerous poor into the parishes, in
“which they are worked; and that it would be a monstrous ab-
“surdity as well as grievance, if the proprietors of lucrative me-
“chanical instruments, by means of which parishes become bur-
“thened to a very heavy amount with poor, should not contribute
“one farthing to the support of those poor, out of the clear profits
“of this property.

“But that, in another view, if the house “was not erected
“to receive the engine,” if it had not the smallest relation to it,
“the house was indisputably a tenement, was indisputably a subject
“rateable; and if so, the court without quashing the rate, would
“refer it to the sessions to adjust the proportion of its value: that
“the taxable *premises*, which the case states, that the original
“lessee is to discharge of all burthens, must at least mean the house,
“if it mean any thing: but that in its true sense it extended to the
“whole subject of contest.

“That, upon the second point, it was now much too late to
“contend *generally*, that personal property was not rateable to the
“poor: that, where any species of it has been conceived to be in-
“titled to exemption, some *special* ground has of late been always
“insisted upon: that in the case of [a] the *London* water works, the
“question was stated both upon the bench as well as at the bar to
“be, whether projects of very hazardous adventure, requiring in
“the first instance a vast capital and continually in every subse-
“quent stage subject to very heavy expence and losses, were con-
“trary to all usage, fit objects of taxation? that having recourse to
“such special ground of exemption seemed to demonstrate, that,
“in the opinion of those who so argued, the *general* proposition
“was not tenable; and that in the case now before the court
“there is nothing like risque, or previous capital required, or pos-
“sible loss or heavy expence: and that, under such circumstances,

[a] Atkins v. Davis.

“ the

“ the profits of the lot and cope of lead mines, though uncer-
 “ tain and though the principal itself, the lead mine, was not
 “ rateable, were holden rateable in the case of [a] *Rowlls v.*
 “ *Gell & al.*

1787.

REX
 versus
 HOGG.

“ That with respect to the fact stated, “ that the usage of the
 “ town of *Ribchester* had been not to rate personal property”,
 “ such fact could make no difference upon principle; though the
 “ introduction of it might supply some argument from the want
 “ of any express authority [b] in such case: that, if this pro-
 “ perty had been liable under a custom, it must be liable ge-
 “ nerally; for there is no other legal ground, upon which a
 “ custom can subject it: that local usages may be matter of
 “ accommodation and contract, and in the districts in which they
 “ are found may prevail by force of such contracts; but can have
 “ no binding power against the provisions of the legislature:
 “ that in the case of [c] the *K. v. Saltren* esquire (which was
 “ a question whether tithe was that species of property, which
 “ would subject the holder of it to have a parish apprentice ap-
 “ pointed him, though the case stated that no apprentice had
 “ ever before been bound there in respect of tithe) *Ashburst* and
 “ *Buller* Justices, both expressly held, that that circumstance could
 “ make no difference: and that in the case of the *K. v. Harman*
 “ *Probyn J.* declares the law in the same manner: “ usages that
 “ can vary the construction of an act of parliament, must be uni-
 “ versal, and not only the usage of a particular parish.”

“ That, as to the general usage with respect to this species of
 “ property, it could make no difference, whether any instance
 “ of its being rated had ever before occurred; for that, till the
 “ case of the weighing engine, that property had never been any
 “ where charged, and yet the court had no difficulty upon that
 “ ground.

“ *Bearcroft*, *Cockell* Serjeant, and *Topping*, in support of the
 “ rule to quash the order of sessions, confirming this rate, con-
 “ tended; that the case of the *K.* and *St. Nicholas* in *Gloucester*

[a] E. 16 G. 3. 1776. Cowp. 451.

[b] Vide fo. 156. ante.

[c] E. 24 G. 3. 1784. post.

[d] E. 12 G. 2. 1739. Bott. 8.

1787.

REX
versus
HOGG.

“ was materially distinguishable from the present : that it differed
 “ in a particular of all others the most considerable in the decision
 “ of this case ; that is, that the machine was there expressly stated
 “ to have been “ erected in the street :” that it was consequently
 “ fixed to the freehold ; and that it was admitted, that the cor-
 “ poration, who were assessed for it, erected it there as owners of
 “ the soil : that this case of course fell within the very words of
 “ the stat. 43 *Eliz.* ; which the court had frequently and very
 “ wisely declared, they would not extend by construction, and
 “ carry any farther beyond the letter : that the engine in the pre-
 “ sent case was on the contrary found “ to be no ways annexed or
 “ fastened :” that it was “ placed on the floor” like a chair : that
 “ the wax-work in *Fleet-street* might be as well called a tene-
 “ ment, or considered as appurtenant to the freehold ; and that
 “ any principle, upon which it could be rated, would apply
 “ equally to any article of household furniture : that the *inference*
 “ of the engine’s being necessarily attached to the freehold, because
 “ the case stated that it was generally worked with water, could
 “ not be admitted ; as each of the cases returned by the court
 “ below had *positively* negatived this fact, by finding that it “ was
 “ not fixed, that it might be moved with pleasure and carried out
 “ and worked in any other place :” and that the finding here also
 “ excluded another argument that had weight in the decision of
 “ the *K. v. St. Nicholas in Gloucester*, i.e. “ that the house might be
 “ said to have been built for the steelyard and not the steelyard
 “ for the house ;” as it expressly states “ that these engines were not
 “ adapted to any particular building.” That in truth this could
 “ not in legal contemplation any more than in common sense be
 “ taken as an intirety, as one single, inseparable subject ; inasmuch
 “ as upon the death of the owner, they must pass into different
 “ hands ; the house, if freehold, would descend to the heir, and the
 “ engine would go [a] to the executor.

“ That no mechanical engine had ever yet, under any circum-
 “ stances, been rated : that policy and the interests of trade forbade
 “ it : that to subject them now would be of very serious public
 “ consequence, would be ruinous to the staple of the country :

[a] To this point see the case of the Salt-pans. *Lawton, administrator, v. Salmon esq;*
 E. 22 G. 3. 1782.

“ that

“ that the argument on the other side necessarily went to sub-
 “ ject the stocking frame and all the machinery of the woollen
 “ manufactory to taxation : that these had never been attempted
 “ to be rated, though they had existed ever since and long before
 “ the existence of the statute : that it would therefore be too
 “ much even to argue that this was a property clearly and *undoubt-*
 “ *edly* rateable ; and that it seemed to be agreed by all the court
 “ in the case of *Atkins & al. v. Davis & al.* that in *doubtful* cases
 “ usage ought to have great weight ; and that it would explain,
 “ though it ought not to controul an act of parliament.

“ That it must be, that the manufacturer would in some degree
 “ be a sufferer, if these engines were adjudged rateable : that if
 “ the original owner had formed his calculation in building them
 “ or the mesne holder in taking them for a term of years, at a
 “ time when there existed no idea that such an article was liable
 “ to be taxed, they would take care not to submit in future to the
 “ loss of the whole amount of the tax, but would not fail to throw
 “ at least his proportion of the burthen upon the labouring hand ;
 “ and that it would thus operate as a tax upon labour and the
 “ manufacturer.

“ With respect to the second point they insisted ; that though
 “ they might contend, that there exists no adjudication, in which
 “ any particular species of personal property has been holden lia-
 “ ble, independant of usage (which is expressly negatived in the
 “ present case) it was sufficient here to say, that this is no rated
 “ as personal property, but as realty. The rate is upon “ a build-
 “ ing :” and therefore that under the denomination of realty and
 “ in that character only could this property be shewn to be liable,
 “ and the rate supported.

Ashburst J.

“ It seems to me that this case is still left imperfect ; for it is
 “ not stated negatively that this engine, while it is in a state
 “ of working, is not in some way or other fixed to the house.
 “ It is only stated, that it is not fixed to the *floor* : but it may be
 “ fixed to the walls of the building without being fixed to the
 “ floor. We can assume no facts on either side : but one should
 “ suppose, that it must be fastened in some way ; otherwise, as it
 “ is worked by water, the weight of the water must displace it :
 “ and if so, it is exactly the case of the *K. v. St. Nicholas in Glou-*
 “ *cester*. But it is enough that part of the subject is rateable ;

N n 2

“ and

1787.

REX
 versus
 HOGG.

1787.

REX
versus
HOGG.

“ and the rate is on the *house*. Then the quantum of it is not for
“ our consideration ; and this court will not interfere with the
“ province of the Justices, or enter into a general question, collateral
“ only to the point before them and not necessary to the determination
“ of it. Besides, the whole is leased as one intire thing ; for the
“ lessor contracts to pay the taxes for *the premises* ; which term
“ comprehends every thing demised, the *engine* as well as the
“ house : and this finding of the case lays quite out of the ques-
“ tion all argument that has been used to shew, that an adjudica-
“ tion, subjecting this kind of property to taxation, might operate
“ as a tax upon labour ; an idea that this court would not give
“ countenance to.

“ *Buller J.* I have always thought that it would have been bet-
“ ter to have given a direct opinion at once upon the general con-
“ struction of the stat. 43 *Eliz. c. 2.* than, by making single in-
“ dependent adjudications and avoiding the general question, to
“ have encouraged the stating of particular cases, and suffered such
“ a waste of expence in inquiring, whether the circumstances of
“ those cases formed exceptions to a general rule, supposed and
“ assumed, but which had never been positively and unequivocally
“ pronounced. In the case of *Atkins v. Davis*, I stated the prin-
“ ciple to be, that every man was to pay according to his ability.
“ This seems agreeable to natural justice ; and if right, the court
“ in particular cases have only to look whether any ground of ex-
“ emption is stated, any reasonable exception to this general
“ principle. In that case I agreed with the court, that we could
“ not impose a new tax upon the subject by construction. We
“ are not to make, but explain, the law. But I then thought,
“ and I still think, that as a general question, personal property
“ is rateable ; and that it is necessary to shew the particular case
“ to be an exception. In some cases it may be inexpedient to rate
“ personal property, in many it may be attended with difficulty ;
“ but if the party aiming at it can effect it, we must pronounce
“ the law : and I think that by law it is rateable.

“ As to the objection founded upon the different qualities and
“ and character of the component parts of this property, and that
“ one would descend to the heir and the other go to the executor,
“ it is perfectly immaterial here. If the engine were clearly dis-
“ tinct, it would in all cases go to the executor ; but, if the sub-
“ ject is rateable, no matter to whom it would pass. Here how-

“ ever they are both in the hands of a lessee; and, being so holden together, would go both to the executor.

“ It is said, that this is a rate upon manufacturers, and so it is; but it is not a rate upon labour. Such cannot be maintained. The recompence for the labour of the hand or the head is not, *eo nomine*, or in the moment in which it is made, a subject rateable: but when profits have accumulated and are invested, we cannot go into the enquiry, whether they were the profits of a trade or a profession, or how they were acquired; but the question whether they are rateable or not must depend upon the form that has been given them, the thing that visibly exists. Whether converted into land or however otherwise disposed of, if they are visible and yield an annual profit, they are a subject rateable. The produce of labour, vested in property that is rateable, is then of course rateable.

“ There can be no objection to the *quantum* of the rate, if the subject rated be an intirety. The house and engine are, as such, let together; are called in the case and rate *the Engine House*; and the house acquires a greater value from the use it is put to. I therefore consider them as one and the same thing; and am of opinion that the rate is good.

“ *Grose J.* We have nothing to do with the *quantum* or proportion: our proper enquiry is, whether this is a species of property that is rateable? It is an engine house fitted up with an engine, but whether that is fixed or not is uncertain: both are let together, and the rate is on the building. The engine is evidently a part of the house; for *Walmfley* is stated to be lessee of *the premises*, which comprehend the whole, both house and engine. I therefore consider this as an intire thing. The argument, that the property here is of different kinds, and that one passes to the executor and the other descends to the heir, would if founded, go only to the *quantum* of the rate. No doubt, but that unfurnished and without fixtures or hangings, a house is worth less than when commodiously fitted up; but, if let, it must be taxed at the value of the whole it contains. If upon that point a question is raised, if the value is controverted, the first application must be to the sessions; but no deduction can possibly be made on account of the peculiar nature and descendibility of the particular articles. A tenement of little or no value, fitted up as a malt house and let together with a malt mill, though such

1787.

REX
versus
HOGG.

“malt

1787.

REX
versus
Hogg.

"malt mill is removeable at pleasure, is not only rateable as real
"property under the denomination of a malt house; but also to
"the full extent of the annual amount of the profits, which such
"a mill might have added to the building.

"It has been contended, that this rate cannot be support-
"ed; because the case states, that in this town "the usage has
"been not to rate personal property." This is a general and im-
"portant question, upon which I wish to be understood. The
"universal law of the land cannot bear one interpretation in one
"town and another in another. It is impossible. Private treaties,
"originating in the convenience of the parties and not found to
"obstruct the execution and defeat the beneficial purposes of the
"law, will by all courts of justice be holden obligatory upon
"those individuals at least who personally contract; but these are
"mere matters of compact and accommodation: for if any one,
"that has an interest in the subject and has not concluded himself,
"shall raise the question, we must decide by the general law.
"Where the words of an act of parliament are clear, usage can
"never be attended to: but in doubtful cases and where they are
"ambiguous, general and contemporary usage may be material
"to shew the sense in which the public have received a pub-
"lic law.

"Upon the whole I am of opinion, that this case is not to be
"distinguished from that of *St. Nicholas in Gloucester*.

Lord Mansfield was absent.

Rule discharged, and the
Order of sessions, confirming
the former order of justices, affirmed.

Saturday
May 17.

Rex v. Inhabitants of Mitcham.

With respect
to the public,
the land tax
act is to be
considered as
a tenant's
tax; whate-

TWO Justices by an order remove *John Heard, Elizabeth*
his wife and their five children, from the parish of *Mit-*
cham in the county of *Surrey* to the parish of *Moredon* in the
same county. The sessions on appeal adjudged the settlement to
be at *Mitcham*, quashed the order and stated the following case:
ever may be the view of it, as between landlord and tenant: consequently where both are named and
neither expressly rated, but the tenant pays, the tenant acquires a settlement. Under this construction
of the statute, where the title of a rate is upon *inhabitants*, this word seems to import *occupiers*.

That

That *John Heard*, the pauper, inhabited for several years a house at *Moredon*, which he rented of *Mr. Gasson* who was also an inhabitant of the parish of *Moredon*, at the clear yearly rent of five pounds, clear of all taxes, parliamentary and parochial. That, whilst he so held and occupied the same, an assessment was made on the said parish of *Moredon* for the land tax; the title of which was as follows, "*Surrey, &c.* an assessment on the inhabitants of the parish of *Moredon*, for raising a sum by a land tax for the service of the year 1777," and made in manner and form following, as far as it respected the said *John Heard*, prout patet:

1787.

REX
versus
inhabitants
of
MITCHAM.

Rent.	Landlord's Name.	Tenant's Name.	
£. 5 0 0	Mr. Gasson.	John Heard.	£. s. d. 0 9 9 $\frac{1}{2}$

that the said *John Heard* paid the said 9 s. 9 d. $\frac{1}{2}$. to the collector who demanded the same.

Settlement at
Moredon.

Mingay shewed cause in support of the order of sessions; and insisted, that this rate in its form neither imported a rating or a paying (both of which of which are necessary to give a settlement) by the pauper in his own right; that, tho' it was true that the payment had been made by the hands of the pauper, the tenant, yet it was in legal contemplation a payment by the landlord: that the court must take it to have been on account of him, upon whom the law had thrown the burthen: that, tho' the tenant must evidently be liable to have the tax levied upon him, it was nevertheless a tax imposed upon the landlord: that it must consequently have been received in this character by the officer; for the collector did not appear to have been privy to any agreement to the contrary, nor could any such private agreement affect the parish: that the case of [a] the *K. v. the inhabitants of Carshalton* went upon the principle [b] that must govern the present: that

[a] E. 15 G. 3. 1775. Burr. Settl. Cas. 809. recognized in the case of the *K. v. the inhabitants of St. John, Southwark*, Tr. 19 Geo. 3. 1779 ante p. 62.

[b] In that case Lord Mansfield said, I think the case turns on this ground, that it is a landlord's tax. The parish are not helped by it, as they would have been had it been an occupier's tax.

1787.
 ~~~~~  
 REX  
*versus*  
 Inhabitants  
 of  
 MITGHAM.

the only difference between them was, that there the form of the assessments was, "landlords *rated*," here it is "landlords *names*:" that the name of the landlord, unless for the express purpose of charging him and he is stated to be an inhabitant, need not have been inserted; but that by the provisions of the land tax act the tenant is obliged [a] to answer this charge on behalf of his landlord.

The court here inquired in what manner, to whom and in whose name the receipts were given: [b] but this did not appear.

*Mingay.* That according to the general form in use, it is on this account that the tenant is included in the rate, that the collector may know the occupier of the premises charged, [c] the person to whom he is generally obliged to resort for payment. That at most it can only be said on the other side, that the rate is doubtful upon the face of it; but that in answer to this, the fact that was left doubtful upon the rate is expressly found in the case, and decided upon by the court below; who have said that the landlord is rated: and the law also says, that he is in the first instance liable, and that this is not a tenant's tax. That in the case of [d] the *K. v. the inhabitants of Painswick* (where it was left open, [e] whether it was the landlord or tenant that was rated) it was highly reasonable that, in a case as that was upon the poor rate, the circumstance of such rate being a *tenant's* tax should [f] turn the scale: and that by the same rule here, in a case upon the land tax, where it was left equally open upon whom

---

[a] St. 17 G. 3. c. 3. s. 17.

[b] Tho' the names of both landlord and tenant appeared upon the assessment, the circumstance of a receipt given by the collector to the tenant, stating that the sum paid was *assessed upon the landlord*, was holden in the case of the *K. v. the inhabitants of St. James in Bury St. Edmunds*, M. 25 G. 3. 1784. post. p. to decide, that this was a rate upon the landlord, and consequently that the tenant did not acquire a settlement.

[c] The words of this act are, "which said collectors are hereby required to demand all &c. of the parties themselves, as the same shall become due, if they can be found, or else at the place of their last abode, *or upon the premises charged* with the assessment, s. 9.

[d] Tr. 31 G. 2. 1758. Burr. Settl. Cas. 465.

[e] The form of the rate was, "Thomas Clifford *or* tenant."

[f] But this circumstance is not touched either at the bar or by the Bench upon the argument in this case.

the



the assessment was made, the circumstance of that tax being a landlord's tax ought equally to form the rule of decision.

*Palmer*, in support of the rule to quash this order, insisted; that the pauper had acquired a settlement, having been charged with and having paid his share towards a publick tax: that the case of the *K. v. Carshalton* was essentially different from the present: that there it was shewn by the column of the rate who was rated: but that it does not here in the same way appear who is rated: that there the title of the rate was "on the *landholders* and inhabitants;" here upon the *inhabitants* only: that the tenant is the only person who with respect to the land must be the inhabitant; and therefore, coupling the title of the rate with the rate itself, that it was equivalent to an express rate upon the tenant: that tho' it is true that the landlord is in this case stated to be an inhabitant, that circumstance as to the present question must have been merely accidental; as it cannot be supposed that the property in a parish is generally inhabited or occupied by the landlord; and that the decision in the above case was made with great and declared regret. That tho' it was commonly said that the tax was a landlord's tax, yet properly speaking, and upon principle, it was not so: that the rate is a designation of the person who is the material object of the authority of the assessors, the person who is to be called upon for payment: that the intention of the legislature is to subject the visible holder of the land: that this, merely because in the event it comes out of his pocket, cannot be considered as a tax upon the landlord alone: for upon him the poors rate and all other rates ultimately fall; as the tenant will give no more for land than after all deductions it is worth: that from a consideration of the several clauses of the land tax act the tenant will clearly appear to have been the proper and immediate object of the legislature: that in *§. 4.* of the annual land tax act, (all which acts are copied from the first of the present reign,) the charge is to be made "upon all persons having or holding any such messuages, lands, &c." [a] now the tenant is the person *having or holding*; and these are the

1783.

REX  
versus  
Inhabitants  
of  
MITCHAM.

[a] But in the first land tax act, which passed June 2. 1689. 1 W. & M. c. 20. § 4. after the words "having or holding," were added, "in his, her, or their actual possession." Ruffhead's appendix to the statutes, vol. 10. p. 201. Thence I conceive, that from the period of the omission of these words (whensoever that first happened, and whatsoever might have been the original and previous intention of the legislature) it could not have been the intention that the tenant should *alone* be responsible for the payment. And that the general



1783.  
 REX  
*versus*  
 Inhabitants  
 of  
 MITCHAM.

the very terms in which his interest is in every lease conveyed to a lessee: where there are mesne lords, it is the tenant that must be their representative; for there may be twenty, and then which of them shall be rated? And tho' it is true that by *§. 5.* the person intitled to a rent charge, &c. is liable to his proportion, yet that this is by way of contribution, but never nominally; that he is neither rated or called upon: that the tax always comes from the hand of the tenant, how many soever or to what degree soever there may be others interested. That upon this view of the subject the point seemed to be clear; but that, if it were only doubtful who is rated here, or more correctly upon whom the charge is made, it must be taken to be upon the tenant; for they are the tenant's goods that are liable and his person [a] in default of goods; and, as to the power given him of deducting out of his rent the sum he should be compelled to advance, that circumstance was not introduced into the act with any view to the public. That *§. 18.* having required the tenant "to deduct out of his rent so much as his landlord should and ought to pay and bear," the landlord ought not in this case to pay or bear any part; for the case finds that there is an agreement to the contrary: that, if he is to deduct so much as the landlord is to bear, the tenant cannot be considered by the legislature as paying altogether vicariously: that the quantum of charge, that as against the tenant the owner of the land must bear, will depend upon the contract between them; and that *§. 19.* the next section which impowers the commissioners to settle differences upon this subject between landlord and tenant, is a complete answer to the objection; that the collector has nothing to do with any private agreement and that such could not affect the parish: for, tho' the collector may have nothing to do with it, the commissioners have: that in *§. 64.*, [b] which refers to the double tax imposed by a former clause (*§. 60.*) upon Roman Catholics, by

---

ral understanding of mankind to the contrary had some better foundation than vague and common opinion appears from the case of the *K. v. the occupiers of St Luke's Hospital*; in which Lord Mansfield says: "the land tax differs from the *poors* tax. The landlord, who receives the rent, is to pay the land tax; but the *poors* tax is payable by the occupiers." *M. 1 G. 3. 1760, 2 Burr. fo. 1063.*

[a] *S. 18.*

[b] Vide the case of the *K. v. the inhabitants of St. Lawrence, Winchester, M. 25 G. 3. 1784. post. fo.*



express words the landlord only is subjected to the charge and payment, and the tenant is expressly discharged; consequently that it must have been considered by the legislature that, without such words of charge as well as those of discharge of the tenant, the tenant in all other cases was at least equally liable to both. That the reason, why the landlord's name is now always inserted in the rate, is to afford evidence of his right to vote for knights of the shire: that by stat. 20 G. 3. c. 17. no person shall so vote for any lands, which have not been assessed to the land tax in his name: that by this act these assessments are directed to be made in the very form now used: and that previous to this act it could only have been accidentally that the landlord's name could have been introduced, and not with any view to the assessment or the collection of the tax. [a] That it has been holden in many cases, that a tenant may be considered as rated, though his name is not actually in the rate: that it was so in the case cited of the *K. v. Painswick*; and it has even been holden that his occupation need not be referred to upon the face of the rate: that this was so adjudged in the case of [b] the *K. v. the Inhabitants of Walsall*; where "late Lowbridge's house" was the only entry: and in the case of [c] the *K. v. the Inhabitants of Heckmondwick*; where nothing appeared upon the rate but the name of widow Preston, who had been a former occupier. That therefore, (either by inference from the resolution of the court in the case of the *K. v. Carshalton*, or from the reasoning upon the act itself for the purpose of shewing that, both in general as well as under the agreement with his landlord, the tenant was the proper object of the land-tax act) the pauper, the tenant, was here so rated, as to intitle him to his settlement in *Moredon*.

*Bond G.* on the same side was stopped by the court.

1783.  
  
 Rex  
 versus  
 Inhabitants  
 of  
 MITCHAM.

[a] Vide the case of the *K. v. the Inhabitants of St. James in Bury St. Edmunds* M. 24 G. 3. 1783. post. fo.

[b] M. 18 G. 3. 1777. ante p. 35. which case appears to me not to be distinguishable from the present; for there *Aston J.* with the concurrence of the court says, "the question is singly, whether the parish have taken notice of a man as an inhabitant? And, when they take his money, they must know him. 'The officer's receiving the rate of the tenant fixes it, explains what was doubtful upon the entry and shews notice.'" p. 38. And upon this principle the judgment of the court appears to have gone in the case of the *K. v. the Inhabitants of Endon, Longdon and Stanley*. Tr. 23 G. 3. 1783. post p.

[c] H. 21 G. 3. 1781. ante p. 103.



1783.

REX  
versus  
Inhabitants  
of  
MITCHAM.

Lord Mansfield.

The question is whether the landlord or tenant is the person charged? The assessment does not say who is, but the names of both landlord and tenant are used. The rate alone then is in this case no charge upon either. The answer to this question must therefore be gathered from other circumstances. In the first place, who ought to be charged? undoubtedly the occupier ought. The land it is true is the debtor; but the rate is pointed at the occupier. The parish cannot tell who is the landlord or who has a rent charge. It is upon the occupier that the officer of government takes his remedy; and, though the landlord is directed to allow the sum levied out of the rent, the parish have nothing to do with transactions between landlord and tenant. This is a matter between them; but, for the sake of the public, the occupier, the ostensible person, is to be considered as the person first liable. The next consideration is, what does the assessment profess to be? It professes to be an assessment on the *inhabitants*; that is the occupiers: the landlord may or may not be an inhabitant, the tenant must be. Then of whom is it demanded? of the occupier. Who pays it? the occupier. We may therefore supply from the circumstances that which is omitted in the rate itself; and intend here, that which was expressed in the case of the *K. v. Carshalton*; with which the present decision does not interfere.

Willers J. There are two circumstances that differ this case from that of the *K. v. Carshalton*; viz. the title of the rate and the manner of making it: and the court were there of opinion that the landlord was charged upon the face of it. Here where the expression falls short, and we cannot from the instrument itself collect enough to found our judgment upon, collateral circumstances point out the tenant as the person meant to be charged.

Buller J. In the case of the *K. v. Carshalton* the court went wholly upon the word "rated," which followed the word "landlord" in the same column. The great doubt here has arisen from the common phrase, that the land-tax is a landlord's tax: and as between landlord and tenant it certainly is so; but not so as to the parish and the public. As to this point, Mr. Palmer's arguments upon the several clauses of the act of parliament are unanswerable. And if the point were otherwise doubtful, I think the title of the rate which is on the "inhabitants" would decide.

Under



Under this statute it is the visible owner that is the person to be looked to. It is therefore here equivalent to saying—"tenant rated".

Rule absolute,  
Order of sessions quashed,  
and order of two justices, affirmed.  
Lord Commissioner *Aspburst* was absent.

1783.

*Rex*  
*versus*  
Inhabitants  
of  
MITCHAM,

*Rex v. Justices of Huntingdonshire.*

Wednesday  
May 21.

**U**PON a removal of a pauper by an order of two Justices, the notice of appeal to the quarter sessions was served upon a *Sunday*: had the appellants deferred the service of their notice till another day, they would not have been in time to have given, under the practice established in that court, reasonable [a] notice

The sessions  
are bound to  
receive an ap-  
peal to an or-  
der of remov-  
al, although  
no notice has  
been given.  
to

[a] The two statutes that relate to this subject are 13 & 14 Car. 2. & 9 G. The first enacts, that "all such persons who think themselves aggrieved by any such judgment of the said two justices, may appeal to the justices of the peace of the said county at their next quarter sessions, who are hereby required to do them justice according to the merits of their cause." c. 12. s. 2: The other, that "no appeal from any order of removal, &c. shall be proceeded upon, unless reasonable notice be given by the churchwardens or overseers of the poor of such parish or place, who shall make such appeal, unto the churchwardens or overseers of the poor of such parish or place, from which such poor person or persons shall be removed; the reasonableness of which notice shall be determined by the justices of the peace at the quarter sessions, to which the appeal is made; and if it shall appear to them that reasonable time of notice, was not given, then they shall adjourn the said appeal to the next quarter sessions, and then and there finally hear and determine the same." c. 7. s. 8.

A *Mandamus* has frequently been directed to the sessions to receive and enter appeals at the next sessions after the removal, although no notice of appeal has been given. It was so done without opposition upon the motion of Mr. *Kenyon* in the case of the *K. v. the Justices of Worcestershire*. E. 16 G. 3. 1776: and this point has generally been considered as so perfectly clear, that no opposition has been attempted. But in the case of the *K. v. the Justices of Gloucestershire*. E. 19 G. 3. 1779. Dougl. 182. this application was opposed by Mr. *Dunning*: and on that occasion Lord Mansfield said, "the notice directed to be given by st. 9 G. does not go to the receiving, but the hearing, of the appeal." Previous indeed to this statute a return to a *Mandamus* by the sessions, that an appeal was dismissed for want of that notice which was by their practice on all occasions required (though it was objected, that they should have adjourned it) appears to have been allowed: but the court there considered it merely as a point of practice; of which they say the sessions, in the same manner as all other courts, are the most proper judges Tr. 6 G. anonymous. 1 Str. 315. But now, this statute requires that if reasonable notice, i. e. notice under their practice, cannot be given, then they shall adjourn, and at the next sessions finally hear and determine. Yet with so much rigour has the old rule, ever since the st. of 9 G. been adhered to at the quarter sessions, that even an impossibility or at most a bare possibility of complying with it

has



1783.  
 REX  
 versus  
 Justices of  
 HUNTING-  
 DONSHIRE.

to the respondents for the purpose of trying the merits of the appeal.

The court of quarter sessions (being of opinion that the party aggrieved was not at any rate or for any purpose intitled to appeal, unless the prescribed notice had previously been given to the respondents; and also that, a service of a notice upon a *Sunday* not being a legal service [a] there had not in point of law been any notice) refused to hear, adjourn or enter the appeal.

*Mingay*, who had obtained a rule to shew cause why a *Mandamus* should not issue, directing the Justices to receive and hear the appeal, no cause being shewn, now made the

Rule absolute.

has not with them been admitted as an excuse; and that very lately, E. 19 G. 3. 1783. The *K. v. Justices of the East Riding of Yorkshire*. Dougl. 183. But under the circumstances of that case the court of King's Bench were of opinion, that it was hardly possible that the appeal could have been then entered in time; because by the rules of all courts it is necessary, that such entry shall be made either before they sit, or at a certain hour of the day on which they sit: and accordingly a *mandamus* in that case went.

Though it may not be very easy to account upon what principle it was that the Justices, after the st. of 9 G. still adhered to their former rule, it was yet, in cases where after a removal there had been time to give notice and that notice was not given, very generally the practice at the quarter sessions not to receive an appeal; unless the delay was accounted for and the cause verified by affidavit. As under this statute the appeal must at all events afterwards be heard, to require a notice or an affidavit was to throw an expence very unnecessarily and uselessly upon the appellant: and, as the appellant is the party with whom the pauper remains, and upon whom principally the expence of his maintenance falls, it is in his own wrong that the delay is created; for though the quantum of the allowance for maintenance, provided it does not exceed the expenditure, is arbitrary in the sessions, it is rare that that allowance is very liberal or in proportion to the expenditure.

[a] Vide st. 29 Car. 2. c. 7. s. 6. which enacts, that no writ, process, warrant, order, &c. shall be served or executed upon the Lord's day; but that the service of such, &c. shall be void to all intents and purposes whatsoever.

Saturday,  
 May 24.

### R. v. Inhabitants of Tottington Lower End.

Nine or ten  
 years resid-  
 ence of a  
 child by the  
 direction of  
 his father in  
 a friend's  
 house for the

purpose of his support, is not, if he occasionally visits his father's house as his home, such an absence, as will upon the principle of abandonment, be considered an emancipation, and thereby prevent his following his father's settlement. The age of nurture has no relation to the doctrine of emancipation.

TWO Justices by an order remove *Edward Holt, Sarab*, his wife and their four children, from the township of *Broughton* in the county of *Lancaster* to the township of *Tottington Lower End* in the same county. The sessions on appeal confirm the order, and state the following case:

That



That the pauper, *Edward Holt*, is the son of *Thomas Holt*; who at the time of the pauper's birth was settled in the township of *Tottington Lower End*. When the pauper was seven years old his mother died; and he and his father went to live with the pauper's uncle, *Edward Holt*, in the township of *Pilkington* in the same county: the father boarded; but the uncle out of charity to his brother, the pauper's father, who had four other young children and in order to keep him off the town, took the pauper and provided for him meat, drink, lodging and cloaths: in about eighteen months the father went to reside in *Ratcliffe*, a township adjoining to *Pilkington*; but the pauper continued with his uncle till he was ten years old: about which time the pauper and his uncle's wife (the uncle being from home) having a quarrel in which she beat him, he went to his father's house and staid there about a fortnight; but the father not having a loom to accommodate him as a weaver, desired him to return to his uncle: he accordingly did return, and the uncle taught him to weave in the day, and sent him to school in the evenings: the uncle provided him with meat and cloaths, and received the money he earned; the pauper staid with the uncle on these terms until he was sixteen years of age; but, from his first going to his uncle to that time, he now and then went to see his father at a holiday time or so; and one *Christmas* he staid all night, and did so on other nights. When the pauper was fourteen years old, his father came into the township of *Pilkington* and gained a new settlement there by renting a tenement of 15*l.* a year: the pauper considered his father's house as his proper home, because he was his father; and that he could have gone to him when he pleased, and his father would have received him. The father thought himself obliged to provide for the pauper, whenever the uncle turned him away: and, when the pauper was sixteen years of age, having been struck by his uncle, he told him he would leave him and return home to his father: the uncle said he might; upon which he went to his father, and told him the circumstances. The father said, he was like to take him in, and did receive him as part of his family; the father was then beginning to get his hay; the pauper lived with him as one of the family, and assisted him in making hay until it was got in, which was about a week; and expected to have lived with him endway: but, when the hay was got in, the father told the pauper he had no looms to accommodate him as a weaver, and desired him to return to his uncle, and see if he would

1783.

Rex

versus

Inhabitants of

TOTTING-

TON LOWER

END.



1783.

REX

versus

Inhabitants of

TOTTING-

TON LOWER

END.

Settlement  
at Broughton.

would take him in. The pauper returned, and agreed with his uncle to work for himself, and pay for his board. And it does not appear to the court of quarter sessions, that the pauper ever returned to his father. Some time after the pauper's last return to his uncle, the pauper having taken 2 s. 6 d. or a greater sum of his uncle, the pauper's father gave the pauper's uncle 2 s. 6 d. as amends for the same: the pauper has done no act whatever to gain a settlement in his own right: the father says, if the uncle had gone to live at a great distance from him, he would not have suffered the pauper to have gone with him.

*Fearnley* shewed cause in support of these orders; and contended, that on these facts the pauper could not be considered as part of his father's family at the time the father lived on the farm at *Pilkington*: that he was compleatly separated from that family: that, not having in nine years been absent more than three weeks from his uncle's house, it must be taken that he was domesticated there: that he also went it was true occasionally to his father's for a short space of time, as he might have done to a friend; but that such visits afforded no sort of evidence where was his home: and that he was able to maintain himself, and did so. That upon the principle laid down in all the authorities upon the subject of derivative settlements, he must be considered as emancipated: that the presumption of law that all persons were constructively part of their parents family continued no longer than their age of nurture: that this is the only principle known to the law upon the subject; and that to this Lord *Raymond* points in the case of [a] the parishes of *Eastwoodbey* in com' *Hants* and *Westwoodbey* in com' *Berks*: that emancipation does not at all depend upon matrimony, becoming an adult or a housekeeper; but whether after their seventh year the child is a *bona fide* member of his parents family: that the only proper and legal enquiry in such cases is into the nature, character and circumstances of the child's absence: that in the case cited, as well as that of [b] the parishes of *St. Michael Coslany* in *Norwich* and *St. Matthews* in *Ipswich*, though the fact of marriage was expressly stated in each of them, that circumstance does not appear to have been touched or noticed at the bar, or upon the bench: that it was the length of time only that was insisted upon,

[a] Tr. 7 G. 1. Str. 438.

[b] E. 2 G. 2. 2 Str. 830.



and that that circumstance had undergone much discussion. That in a late case, that of [a] the *K. v. the Inhabitants of Halifax*, the pauper led a rambling and vagabond life and had never had a fixed place of residence, or a home any where but in his father's house, where he kept his cloaths; and that here on the contrary the pauper had a fixed residence for years under the roof of his uncle, who as the case states, *took him*: and he was considered as much one of that family as any one that belonged to it. That in the case of [b] the *K. v. the Inhabitants of Walpole St. Peter's*, the pauper was a minor and had never acquired any settlement; and yet the court held that he was emancipated.

1783.

REX

versus

Inhabitants of

TOTTING-

TON LOWER

END.

*Cockell*, in support of the rule to quash these orders, insisted; that there existed no such imaginary rule respecting emancipation, as had been attempted to be supported on the other side: that nothing was more clearly established, than that upon marriage a man ceases to be part of his father's family: that the law was so laid down in the case cited of the *K. v. Halifax*; which recognized the case of [c] the *K. v. the Inhabitants of Bugden*, in which it had been so adjudged: that the case cited of the *K. v. Walpole St. Peter's* turned [d] upon the pauper's having enlisted himself for a soldier, and that that also was the case of a married man. That it was decisive in the present case, that the father had always received the pauper expressly upon the footing of obligation; and that he had done no more than accept for the time (and whether that was long or short was perfectly immaterial) the good offices of a near relation, who had better ability than himself, in affording the boy that protection, which he was himself naturally and legally bound to find.

Lord Mansfield.

The pauper considered himself as part of his father's family, and the father considered him in the same light. When a man acquires a settlement, he acquires it for himself and his family. There is no reason to say this boy was not part of his father's family. The uncle was under no obligation to do any thing for him, or to keep him an hour; and the boy in point of fact on every disagreement went to his father's house as his home; and he received him, as he was bound to do. I see no ground for considering this an emancipation.

*Wilkes and Buller*, Justices, concurring, Rule absolute and Lord Commissioner *Ashurst* was absent. both orders quashed.

[a] E. 15 G. 3. 1775. Burr. Settl. Cas. 806.

[b] E. 9 G. 3. 1769. Burr. Settl. Cas. 638. 1 Blackst. Rep. 669.

[c] H. 21 G. 2. 1747. Burr. Settl. Cas. 270.

[d] See a note upon this case in the *K. v. the Inhabitants of Stretton*. H. 25 G. 3. 1785. post. p.



Wednesday  
May 28.

Rex v. Inhabitants of Iveston.

If there is an  
inhabitancy  
under a hir-  
ing for a year  
of forty days  
at any inter-  
vals through-

**T**WO Justices by an order remove *James English* and *Margaret*, his wife, from the township of *Newburn* in the parish of *Newburn* in the county of *Northumberland* to the township of *Iveston* in the parish of *Lanchester* in the county of *Durham*. The sessions on appeal confirm the order and state the following case: out the year in any number of parishes, wherever the last day's inhabitancy shall happen to be, such will connect with any prior inhabitancy in the course of the year; and, if throughout the year the whole will there amount to forty, in that place the settlement attaches.

Settlement  
at *Kyo*.

That *James English* at *Martinmas* 1752 being then an unmarried person, not having child or children, was hired by Messrs. *William Newton* and *Samuel Newton* as a collier, to serve them for one year from thenceforth: that *Kyo* and *Iveston* are two separate townships in the parish of *Lanchester*, and maintain their own respective poor. That he entered into the service accordingly, and served out the whole year: that he resided at *Kyo* when he was so hired, and continued there till the *May* day following, and then he married: that about fourteen days after his marriage he took a cottage in the said township of *Iveston*, which is not far distant from *Kyo*: and without the privity of his master removed thither from *Kyo* with his wife, where they continued above forty days, and until about fourteen days preceding the expiration of his service; and then they returned to *Kyo*.

*Lee*, Solicitor General, shewed cause in support of these orders; and contended, that a settlement by service is acquired in that place, in which the servant inhabits the last forty days of the year in such a capacity in which it is legally competent to him to acquire a settlement: that it is fully settled [a] that, provided the pauper is single (and thence capable) at the time of making the contract of service, marriage during any part of that annual service will not take away his capacity: that a man may acquire as many settlements as there are forty days in the year; but that the law and the sense is, that they must follow each other in an unbroken series, without interruption or interval.

*Buller* J. But during the forty days (in what manner soever they ought to be reckoned) in which the pauper inhabited at *Iveston*

[a] Vide the case of the *K v. the inhabitants of St. Giles's Reading*, Tr, 18 G. 3. 1778. ante p. 54.



without the consent of his master, was he or was he not [a] removeable?

1783.

REX  
versus  
Inhabitants of  
IVESTON.

*Lee.* A hired servant is not removeable during his service: and it will often happen that the service cannot, as here, be performed where the master resides; and the justices have no power to dissolve a contract.

*Willes J.* But in the case of a servant working in a coal-pit, which is the present case, such servant may be in the service of his master: here it does not appear that the pauper was at the time in his service; [b] and the case expressly finds that the residence in *Iveston* was without even the privity of his master.

*Wilson J.* in support of the rule to quash these orders, insisted; that, as a settlement cannot be acquired by service till the year is fully compleated, the pauper, when he quitted *Iveston*, could not have acquired a settlement: that it was yet, it was then, uncertain whether he ever would; and that the construction of the act of parliament was, that if there is an inhabitancy of forty days at any intervals throughout the year in any number of parishes, wherever the last days inhabitancy shall happen to be, such will connect with any prior inhabitancy in the course of the year; and if throughout the year the whole will there amount to forty, in that place the settlement attaches. That this was so settled in the case of [c] the *K. v. the Inhabitants of Lowess*; and that the principle of that decision had been confirmed in the case of [d] the *K. v. the Inhabitants of Hulland*. That that case differs from the present only in

[a] Even if a servant becomes chargeable, this point seems to have been left as a matter of some doubt by *Lee Ch. J.* in giving his judgment in the case of the *K. v. the inhabitants of Fittleworth*, M. 18 G. 2. 1744. His words are, as reported by *Sir James Burrow*: "It was said, that even servants [this was the case of a certificated man holding an office] were removable during their service; but no case has been cited to prove that servants are so: and I should very much doubt it." *Settl. Cas. fo. 240.* As given by *Mr. Bott*, his words are, "and if a servant should become chargeable to a parish, I think he might be removed." *fo. 342. S. C.* But it should seem that if a servant, during his term, though at a time when he is not performing any actual service for his master and without his privity, inhabits a parish and by such an inhabitancy would acquire a settlement (and this appears to have been so adjudged in the case of the *K. v. the Inhabitants of Hedfor*. Tr. 18 G. 3. 1778. ante p. 51. and recognized in the case of the *K. v. the Inhabitants of Nympsfield*. H. 21 G. 3. 1781. ante p. 107.) I should conceive he must a fortiori be irremovable.

[b] In the *K. v. Hedfor* this view of the subject was indeed raised, but touched very slightly at the bar; neither did the court enter into any particulars in giving their judgment: And, without adverting to the authority, the principle seems here to have induced the court to entertain a different sentiment.

[c] E. 16 G. 3. 1776. *Burr. Settl. Cas. 825.*

[d] E. 21 G. 3. 1781. ante p. 118.



1783.

REX  
versus  
Inhabitants of  
IVESTON.

this circumstance, that there were not there forty days successive service in either parish; and this the law says there need not be: that as it could not be controverted, that, till the year was completed, a settlement by service could not possibly be perfected; it was absurd, and as contrary to reason as to the authorities, to say, that while the pauper was for the fourteen days preceding the expiration of the term inhabiting in *Kyo*, he was acquiring a settlement in another place. To be sure his marriage after the commencement of his contract could be no bar to his acquiring a settlement any where.

*Willes J.*

Independent of authorities, the rule, as it is recognized in the *K. v. Hulland*, seems to me to be agreeable to the construction of the act of parliament; for the service is not consummate till the last day: the servant shall therefore be settled in the place where he served, when it was so completed. This case is similar in principle to that of *Hulland*; and precisely that of *Lowes*. We have laid down the rule and nothing is offered to impeach it; and we are all of opinion, that it ought to be adhered to [a].

Lord Mansfield and Buller, J. concurring,

Lord Commissioner Ashurst was absent.

Rule absolute, and both Orders quashed.

[a] And this point seems to have been considered as fully settled in the case of

### Rex v. Inhabitants of Great Bookham.

Tr. 26 G. 3. 1786.

TWO Justices remove *James Longhurst*, *Nancy*, his wife and their son from the parish of *Great Bookham* in the county of *Surrey* to the parish of *Fetcham* in the same county. The sessions on appeal adjudged the settlement to be at *Great Bookham*, quashed the order and stated the following case: That the pauper, *James Longhurst*, was born in the parish of *West Clandon* in the county of *Surrey*. That at *Michaelmas* 1784 he was hired a yearly servant to *Martin Richmond* of the parish of *Fetcham*, farmer, at the yearly wages of 7*l.*: that he served the year out: that he was single when hired; but married the *January* afterwards: that he resided forty days in the parish of *Fetcham* during his service and before his marriage: but after his marriage he took a house in *Great Bookham*, and slept constantly



"stantly with his wife in the parish of *Great Bookham* during the  
"remainder of his service, excepting the last night of his service;  
"on which last night he slept at his master's in the parish of  
"Fetcham.

1783.

REX

versus

Inhabitants of  
GREAT  
BOOKHAM.

Settlement at  
Fetcham.

Wednesday,  
June 28.

"Arthur Palmer.

"George Bond.

"And now upon the motion of Mr. Palmer, no cause being  
"shewn,

"Rule absolute, and

"Order of sessions, discharging

"the order of two justices, quashed."

Thursday,  
June 22.

In the case of an apprentice the same rule had also been observ-  
ed. *Vide* the *K. v. the Inhabitants of Sandford*. Tr. 26 G. 3.  
1786. 1 Durnford and East, 281.

Ledwith v. Catchpole.

Monday,  
May 19.

**T**HIS was an action of trespass and false imprisonment tried  
before Lord Mansfield at Guildhall. The defendant, who  
was one of the marshalsmen of the Lord Mayor of London, pleaded  
the general issue, upon which issue was joined. The jury found  
a verdict for the plaintiff with 20*l.* damages.

Where a fe-  
lony has ac-  
tually been  
committed, a  
constable or  
even a private  
person, acting  
bona fide and  
in pursuit of  
the offender  
upon such  
information  
as amounts  
to a reason-  
able and pro-  
bable ground  
of suspicion,  
may justify  
an arrest.

And now upon motion for a new trial, Lord Mansfield reported  
the evidence to have been: That one Smith, who had lost some  
linens to a large amount, brought one Stevens to the defendant:  
that Stevens said, that one Madox had called a coach and put Smith's  
bale of goods into it at a public house: that the plaintiff put his  
head into the coach: that afterwards the coach stopped at another  
house; and that the plaintiff met it there: that the defendant,  
suspecting the plaintiff to have been concerned in the theft from  
the circumstance of his having been twice so seen at the coach,  
took the defendant on a Sunday to the plaintiff for the purpose of  
having him apprehended: that, when they came to him, neither Smith  
or any other person charged the plaintiff with a felony: that Smith  
said, "I have lost some cloth; but I don't say that it was he who stole  
it: I know nothing of that; but stolen it was:" that defendant,  
being asked by plaintiff what authority he had to arrest him, pro-  
duced



1783.

LEDWITH  
versus  
CATCHPOLE.

duced a hanger, and said, "That was his authority:" that he then did arrest the plaintiff, and took him to the Poultry Compter; from whence he was taken the next day before the sitting Alder-man and discharged.

*Peckham* shewed cause against this rule; and insisted, that this case was very distinguishable from that of [a] *Samuel v. Payne and others*, upon the authority of which the defendant had ventured upon this application: that that case had decided no more, than that a peace officer is justified in making an arrest without a warrant in all cases, if a charge of felony is made upon the prisoner: that here on the contrary, though both persons upon whose charge the defendant pretended he came to take up the plaintiff were present, none was made by either; and one of them expressly disavowed the least knowledge of the plaintiff's criminality: and consequently that the defendant's conduct was as illegal as it was violent and unbecoming.

*Adair* Serjeant, Recorder of *London*, and *Davenport*, were in support of the rule for a new trial: and *Adair* admitted, that the present case had been well distinguished from that of *Samuel v. Payne*; upon the ground of which, the rule had been obtained: but insisted, that there was another ground upon which the rule might well be supported: that in the other case it had been decided; that where there is a *direct charge*, a constable is justifiable, though *no felony* had been committed: that here the ground, though different, is equally good: for that here there was a *felony committed* and also *very strong circumstances of suspicion* against the plaintiff stated to the defendant at the time; and in such a case a constable, acting *bona fide*, is, without a *positive charge* made, justified in apprehending. And that the defendant acted *bona fide* is unquestionable: he did not even know the plaintiff, and against a stranger he could not entertain malice. These circumstances were therefore, without the warrant of a magistrate or an express charge, a sufficient authority for the defendant, a *peace officer*; as by the most established law a *private person* is justified in apprehending upon suspicion, [b] if the party apprehended afterwards appears to have been guilty.

[a] E. 20 G. 3. 1780. Dougl. 345.

[b] Vide 2 Hawk. P. C. new Edit. 1787. tit. arrests by private persons. f. 18. p. 121.



*Buller, J.* But, if he acts on suspicion, must it not, to make it a justification, be a reasonable ground of suspicion in his own mind and [a] within his own knowledge, and not merely the information of others; for, if it is not so, he takes upon himself to judge of the evidence of others; when he ought to go before a magistrate, who is the proper judge.

*Lord Mansfield.*

How are felons in general taken up? From descriptions of them circulated in hand bills. The defendant here might be induced to suspect from what had been laid before him.

*Davenport* insisted, that as this transaction passed upon a *Sunday*, it was impossible to have referred the matter to a magistrate, as there is no fitting alderman on that [b] day: and that, if on this day peace officers could not on that account act at the suggestion of others in cases of strong probability, numberless felons must elude the hands of justice: and he cited [c] *H. P. C.*, where it is said, that in many cases of arrests "the constable may execute his office upon information and request of others that suspect and charge the offenders, *nay though it be but with suspicion thereof*:" and insisted, that in the present case it could not be said, that the defendant had acted upon a mere causeless suspicion or such as had not a probable foundation.

*Adair* now cited [d] *Statuta civitatis Lond.* (within which the arrest was made) as directly applicable. The preamble speaks of

[a] 2 Hawk. P. C. f. 18. p. 121. and tit. arrests by public officers. f. 11. p. 132.

[b] It appears from the state of facts in the case cited of *Samuel v. Payne*; that from this circumstance the plaintiff who had been committed upon a *Saturday* was not discharged till the *Monday*.

[c] 2. 89.

[d] The words of the statute are, "Le Rey qe veut la pes de citee estre bien garde entre tutez gentz ad entendu qe ces distz articles ne sont poynt tenuz ne estre ne poent pur ceo qe ses mynystres sovent ou ceste e enquerelez e grevement punyz devant les avotours des pleyntes e aillours en sa court pur enprisonementz e altres punyssementz de meffesours e de suspecionous de mal pur ceo qe il ne eurent de Rey garaunt a ceo fere dont les distz mynystres ou ceste e sunt meyns osez a chastier e punir les trespasours e par tant sei abandissent de meffere e donna as altres ensauple de mauveyste a grant peril de la citee a grant nuture des meffesours veut e comande qe desormes nul de ses mynystres seit enquerele devant ses auditours des pleyntes ne aillours en sa court pur nul enprisonement ou alze e punyssement de meffesours ou suspecionous de mal si ens ne seit qe mynystre le face par aperte malice e sa propre venjaunce ou par venjaunce de autre qe par malice le proivre e ne mys pur la garde de sa pes. E le Rey cestes purveaunces e ajoustelementz veut qe en lavant dite citee seint bien e sauvement gardez pur sa pez meyntenir ove les amedementz quant il li plerra mettre pur le profit de sa citee." 13 E. 1. stat. 5, Ruffhead's Appendix to the Statutes. fo. 13.

ministers

1783.

LEDWITH  
versus  
CATCHPOLE.



1783.  
 LEDWITH  
*versus*  
 CATCHPOLE.

ministers of justice; and it then proceeds, that they shall not be liable, &c. for apprehending or imprisoning persons suspected of felony, unless malice shall be proved. But the court hardly seemed to notice it [a].

*Peckham* now insisted, that, even in the view in which the question was placed by the argument on the other side, if ministerial officers might in these cases at their risque exercise a discretion, the jury, who were the proper judges of the fact of intent and malice, had pronounced that there was here no just cause of detainer.

*Buller, J.* This is a question of consequence, and will require some consideration. I think, that, if we were to say that a constable is justifiable in this case, we should go the length of saying, that he is to some purposes a judicial officer; which is going farther than has ever yet been adjudged. [b] It would be to allow a constable to examine witnesses, act upon their testimony though he cannot administer an oath, and judicially to conclude, whether there is or is not a reasonable ground of suspicion; and this might be attended with danger. Where a positive charge is made, the party making it is obliged to follow it up with a prosecution, or is himself liable to an action. In such case the constable is merely ministerial and bound to take the party up and carry him before a magistrate. The magistrate must then examine into the matter upon oath, which the constable cannot do.

*Willes, J.* A felony is committed. The prisoner looked into the coach, where the stolen goods were deposited at the time, and afterwards met the coach, where it stopt. Then called upon as the constable was to act and under such strong circumstances of suspicion, I think it became his duty so to act; and that there ought to be a new trial.

*Lord Mansfield.*

The first question is, whether a felony has been committed or not? And then the fundamental distinction is, that, if a felony has actually been committed, a private person may as well as a peace officer arrest: if not, the question always turns upon this, was the arrest *bona fide*; was the act done fairly and in pursuit of an offender, or by design or malice and ill will? Upon a highway robbery

[a] Probably, because a fact was in proof, from which the jury might have inferred malice; and therefore the provisions of the statute could not have carried the point farther in favour of the defendant than the court were disposed to do upon the general law.

[b] Vide the case of the *K. v. the Inhabitants of Hope Mansel*, in this term, ante p. 252, and the *K. v. Stubbs and others*. E. 28 G. 3. 1788. *Durnford and East*. 2. 395. bery



bery being committed, an alarm spread and particulars circulated, and in the case of crimes still more serious, upon notice given to all the sea ports, it would be a terrible thing, if under probable cause an arrest could not be made: and felons usually are taken up upon descriptions in advertisements. Many an innocent man has and may be taken up upon such suspicion: but the mischief and inconvenience to the public in this point of view is comparatively nothing.

It is of great consequence to the police of the country. I think there should be a new trial.

*Per Lord Mansfield and Willes J.*

Rule absolute.

The new trial came on at the sittings after this term, when a verdict was found for the defendant.

*Rex v. Horner & al'.*

Friday,  
May 30.

**COWPER H.** on behalf of *Richard Horner* and two others, who had been removed by *habeas corpus* from *Exeter* gaol, moved that they might be admitted to bail.

Upon application to bail, the court requires to see the depositions; and will from thence, if they see just cause, without regarding the regularity or irregularity of the commitment, discharge, bail, or detain the prisoner.

The commitment stated, that the prisoners were charged "with To obtain  
" *defrauding and robbing John Cunnett of Dunsford, yeoman, at property by*  
" *Crediton in the county of Devon, under divers false pretences of fraud, and*  
" the sum of nineteen guineas in gold and a ten pound Bank of under a pre-  
" *England bill;*" and that they were committed by a magistrate concerted  
of that county to the county gaol "until the next general gaol de- plan to rob,  
" livery for the said county, or until they shall be thence delivered is felony;  
" by due course of law." but this in-  
tent, the *animus furandi*,  
is a fact to  
be established  
by the jury,  
before the  
legal conse-  
quence can  
result.

Upon the information taken before the magistrate it appeared, that they decoyed the prosecutor into a public house, and had there obtained the money of him for the purpose of playing at cards; and after having prevailed upon him once to cut the cards for one of them (though he positively swore that he had not engaged in play on his own account) under pretence of his having lost the money



1783.

Rex  
versus  
HORNER  
& al'.

money to one of the confederates, they swept it off the table and went away with it.

And Cowper H. now contended, that the charge, as stated in the commitment, being short of a charge of felony and amounting to a misdemeanor only, the prisoners were intitled to be discharged upon bail.

Cowper T. opposed this application; and insisted, that if enough appeared upon the depositions [a] to satisfy the court that a felony had been committed, they would not suffer the public to be deprived of the benefit of the example, because there might be a defect in the form of the warrant: that whether the offence charged was or was not a felony, might be a matter of some nicety: but that cases of this nature had been often so considered.

Buller, J.

Similar cases have often been ultimately so considered: but in cases of this sort the course has always been to leave it to the jury to determine, *quo animo* the money was obtained; and if they should think that it was obtained upon a pre-concerted plan to rob the prosecutor of his money, that it would in such case be felony: Upon this principle at the Old Baily a man was prosecuted for felony, who had obtained money by dropping a ring, wrapped up in a bill or receipt, purporting that the ring had cost fourscore pounds, when in fact it was worth little or nothing: and upon this indictment the man was [b] convicted. The court in such a case never form any judgment whether the facts amount to felony or not; but merely whether enough is charged to justify a detainer of the prisoner and put him upon his trial.

Per Willes and Buller, Justices.

The practice of this court is, and upon reference to the officers of the crown-office we find it to have been long [c] established, that, even if the commitment were regular, the court would look

[a] Vide the case of the K. v. William Clarke Esq; M. 18 G. 2. 2 Str. 1216.

[b] And afterwards in 1785 so determined by nine Judges. 1 Hawk. P. C. new Edit. 1787. tit. Simple Larceny. Note p. 135.

[c] So in a case where the party was clearly intitled to be bailed (being brought up on an *habeas corpus*, and the return set forth the warrant of commitment, in which the cause alledged was "a suspicion of having feloniously killed one J. Lloyd") Lord Mansfield said, "a man committed on suspicion only has a right to be bailed on the *habeas corpus* act; but then there should be the depositions taken before the Coroner produced, without which the court does not bail." Rex v. Gregory. H. 11 G. 3. 1771.

into



into the depositions to see if there were a sufficient ground laid to detain the party in custody; and, if there were not, would bail him: and so if the warrant of commitment were irregular, and a serious offence shewn to have been committed, they would not discharge or bail the prisoner, without first looking into the depositions to see whether there was sufficient evidence to detain him in custody.

1783.

REX  
versus  
HORNER  
& al'.

Motion denied.

Lord *Mansfield* and Lord Commissioner *Askeburst* were absent.

Rex v. *Pickersgill* & al'.

Wednesday  
May 28.

**D**AVENPORT moved for a rule to shew cause, why the return to a *certiorari*, to remove an indictment of the defendant at the quarter sessions of the county of *Middlesex* for a fraud and conspiracy, should not be quashed. A return to a *certiorari* need not be under seal.

The form in which the writ ran was, "To our Justices of Oyer and Terminer, &c. That you or one of you do send *under your seals, or the seals of one of you,*" &c.

And now he contended, that the return not having been made in compliance with the exigency of the writ, as not being under seal, could not be supported. [a]

*Morgan* opposed this application, and insisted; that it was not necessary, and was not usual in writs of enquiry, where it is so directed: and he appealed for this fact to the under-sheriff of the city of *London*, then in court, who confirmed him.

*Buller, J.*

It has been usual not to return coroner's inquests under seal.

*Davenport*, after some consideration, withdrew his motion.

---

[a] In the case of the *K. v. Atkinson Esq;* May 10, 1785 this was one of the errors assigned before the House of Lords; but was abandoned upon the argument.



1783.

Saturday,  
May 31.

## R. v. Inhabitants of Winterfett.

Upon a refusal by the master's wife to receive a hired servant, who had been prevented from entering

into the service for the first month by illness, and the servant's mother saying in his presence, that the quantum of wages should be left to the master and mistress, if any abatement is made in consequence, it is no settlement.

Absence at any period of the service is purged by being received again. A master is bound to support his servant in every period of his sickness.

Settlement at Stainburgh.

TWO Justices by an order remove *George Challenger* from the township of *Winterfett* in the West Riding of the county of *York* to the township of *Stainburgh* in the same riding. The sessions on appeal adjudged the settlement to be in *Winterfett*, quashed the order, and stated the following case:

That about three years ago the pauper was hired at *Barnsley* statutes, which are held a few days before *Martinmas*, to *Thomas Oundsworth* of the township of *Stainburgh* for one year, received 1 s. for his Godspenny, and was to have three guineas for his wages: that that very night of the hiring the pauper fell ill and continued sick and unable to go, and did not go into his service till a month after *Martinmas*; when the pauper and his mother went to the master's house, who being from home they were shewn to his wife; who complained that the pauper had not come to his service according to the agreement, and therefore refused to receive him: whereupon the pauper's mother said, "we must fall into your will for wages, and take what you will allow us;" and left the pauper in his service, where he continued until *Martinmas* following: when the mother was sent for and received for forty-eight weeks wages after the rate of 1 s. 2 d. per week; being less than the rate of the original wages.

*Fearnley*, being called upon by the court to support the rule for quashing the order of sessions, insisted; that an actual or a legal service for a year with an inhabitancy of forty days was all that was necessary to be shewn here for the purpose of a settlement: that the payment or non-payment of the intire wages, even where the ground upon which the abatement had been insisted upon was just and warrantable, could make no difference; if the master, after the fact upon which the objection was founded had happened, continued the pauper in his service, and the pauper compleated his year: that this was settled by many authorities



ties [a]. That, if it were not so, upon any subsequent displeasure conceived by the master a poor man might be compelled to engage in an expensive suit, or relinquish the earnings of his labour, as well as lose his settlement. But that in the present case the point made on the other side being the sickness of the pauper, and that being the visitation of God, his sickness could not be imputed to him as negligence or default; and consequently that in the eye of the law he was as much in the service during his absence for such a cause, as if he had been labouring under his master's roof: that under these circumstances to have deducted any part of his wages without his agreement would have been injustice, and an injury for which an action would lie: that it was equally clear, that at what period of service an absence happened in any case, was perfectly indifferent, if the servant was received again: but that he was not prepared with authorities, as he had not expected to be called upon, not supposing it possible, that an attempt would be made to support this order. That, when the pauper went into the service, though his mother consented that he should lie perfectly at mercy with respect to the terms upon which the contract was to be continued, yet it was still the same, and no new, contract, and bound by the same Godspenny. That if a settlement was in any case to be favoured (and it was every where said that in all cases they ought) the court would not suffer, and that contrary to the intention on both sides, a favoured right to be defeated by a technical and critical interpretation of a concession, made by an ignorant man, in a case in which the justice as well as the law was strongly with him. But that there was no pretence to say that the original contract made between the boy and his master was by this talk with the wife and general submission by the pauper's mother on his behalf, annulled, and a new contract substituted: that the pauper was a legal or constructive, though not an actual, servant, from the first moment of the year, in which he had originally contracted to serve: that to take the question in the opposite point of view: Suppose the mother of the pauper had in his presence told even his mas-

1783.

REX  
versus  
Inhabitants  
of  
WINTER-  
SETT.

[a] Rex v. Inhabitants of Hanbury. 26 & 27 G. 2. 1753. Burr. Settl. Cas. 322, &c. and in the case of the K. v. the Inhabitants of Westerleigh. M. 14 G. 3. 1773. Burr. Settl. Cas. 753. it was said by Aston J. "As to abatement of wages, there are several cases, in which that has been holden to signify nothing."

ter,



1783.  
 REX  
*versus*  
 Inhabitants  
 of  
 WINTER-  
 SETT.

ter, that unless the boy should have a coat into the bargain, or some other small gratuity, or rather generally *something more* (for no specific abatement was stipulated in the present case) he should not enter upon his service; though the law in this case would have aided the master, as in the other it would the servant, was it conceivable, that the consent of the master to yield this indefinite *something* could be holden, and in this kind of transaction and between such parties, to have cancelled the subsisting contract? That the uniform language of the court had been, that in these kind of adjudications, the subject of which were the parole contracts of ploughmen and farmers at country fairs, the rule of construction ought more especially than in any other to be plain and simple, without refinement or subtlety, and level to the common understanding; and that he trusted the present decision would not form an exception to that rule.

Lord Mansfield.

The service had never commenced under the first contract: if it had, no doubt the master must have supported him in his sickness. But that is not the question: the point is, that the agreement acted upon here was a fresh agreement, when he recovered from his sickness; and the beginning of his service was then. Under the former the mistress refused to receive him. Then considering the old contract at an end, the *actual service* was but for eleven months; that is, to the *Martinmas* next: and the submitting to the abatement of the month's wages at the end of the year is an affirmance of the agreement made by his mother; and this, as rescinding the original agreement, destroys more than the *legal or constructive service*; it shews also that there was no hiring for a year: so that both the hiring and service must be considered as imperfect and ineffectual.

Buller, J. If a servant is taken ill after the service has commenced, the master is bound to support him, and cannot turn him away on that account. But it is not true, that the service began under the first contract. That was executory. It was made some days before *Martinmas* to commence at *Martinmas*; and in fact it never commenced. When the pauper went, they made a new contract, and under that his service commenced. [a]

[a] Slender circumstances have been holden to constitute the difference between contracts with respect to their continuance or dissolution, and to decide whether services under them would or would not connect for the purpose of giving a settlement. Vide the *K. v. the Inhabitants of Grendon Underwood*. Tr. 23 G. 3. 1783. post. p.



Willes, J. concurring.  
Lord Commissioner Ashurst was absent.

Rule discharged, and  
Order of sessions quashing the  
Order of two justices, affirmed.

1783.

REX  
versus  
Inhabitants  
of  
WINTER-  
SETT.

Two days after, on the last day of term, *Fearnley* said, he had looked into the authorities; and begged leave to state a case or two applicable to this subject: that in the case of [a] the *K. v. the Inhabitants of Hanbury*, it was laid down by *Lee Ch. J.*, "that the absence of the servant in the beginning does not make any real difference at all: for service has not been taken strictly, tho' hiring has." Monday June 2.

Lord Mansfield.

Whether at the beginning, middle or end of the term, if the service begins, absence is the same at all times: but the ground the court went upon was; that here, under the hiring for a year, it never began at all.

*Fearnley*. That upon the subject of the period at which the service had its legal commencement, he must not presume to repeat what he had before submitted; but that, even in that view of the question, and supposing the hirings to have been *ejusdem generis*, they might legally be connected; and would, if either were a hiring for a year, give a settlement. That in the case of [b] the *K. v. the Inhabitants of Fifehead Magdalen*, where there were two hirings in the same species of service, though the new contract was not only for a different sum and that near doubly the amount of the original contract, but also where there was an actual discontinuance of an hour between the two contracts, *Lee Ch. J.* held, that "the sameness of the contract has not been so strictly insisted upon, as to make it absolutely necessary that it should be under the very same bargain:" and *Probyn* said, "It is the same service, tho' performed under two contracts": [c] That here the difference in the amount of the wages was not made the subject of contract

[a] Tr. 26 & 27 G. 2. 1753. Burr. Settl. Caf. fo. 326.

[b] M. 14 G. 2. 1737. Burr. Settl. Caf. fo. 118.

[c] But this is a ground which Lord Mansfield would not admit in a case, where the hirings were *ejusdem generis*. He says, "upon his return he does not agree to continue the  
" old



1783.  
 REX  
*versus*  
 Inhabitants  
 of  
 WINTER-  
 SETT.

tract between the parties, or even, as appeared by the case, ascertained upon any principle in the final settlement dictated by the master: that therefore, though they were to be taken as two different contracts, still the law was the same; and that under such a service a settlement is acquired.

Lord Mansfield.

Then the service under the last hiring for a year was there coupled with the former service under a hiring for less than a year. Here there are also two hirings, but there was clearly no more than one service, and that for less than a year. Your cases are good law; but they don't apply.

Fearnley further contended, that as no second hiring had been stated in the case, it ought to be returned to the sessions, to have that fact found.

But the court were of opinion, that this was unnecessary, as they had found enough to shew, that there was no service under the first.

Saturday,  
 May 31.

Rex v. Stevens.

The authority given by the stat. 43 Eliz. c. 7. to convict before any justice, &c. of a county, city &c. of any

THE defendant had been convicted under the stat. of 43 Eliz. c. 7. [a] by a Justice of the peace for the isle of Ely in the county of Cambridge, for unlawfully breaking and cutting hedges and fences in the said isle and county, with intent to take and carry away the said hedges and fences.

or town corporate, where the offence shall be committed, is constructively given to any justice, place, district or liberty, in any county where &c.

The

“old service, but makes a new contract for more wages. There was therefore a compleat “abandonment and discontinuance.” Rex v. Inhabitants of Ellisfield. H. 17 G. 3. 1777. ante. p. 4. And it is farther observable, that his lordship there represents the court in the K. v. Fifehead Magdalen to have gone not upon this ground, which the reporter expressly states that every one of the Judges took, and that they adjudged it not to be a discontinuance, but upon the principle that there could not be a fraction of a day; of which there is not the smallest trace in the report. His lordship therefore appears to have been long and strongly impressed with this idea, as he first brought it forward at a time when, as far as it went, it operated against the judgment that the court pronounced.

[a] The words of the act are, “Before some one justice of peace, mayor, bailiff, or “other head officers of the county, city or town corporate; which said justice or other “head officer shall have power, by force of this statute, to minister the said oath, where the “offence shall be committed, or the party offending apprehended; shall give the party and “parties such recompence and satisfaction for his and their damages, and within such time

as



The isle of *Ely* is a district, a liberty, or one of the divisions of the county of *Cambridge*, and not a city or town corporate.

The conviction had been removed into this court by *certiorari*, and *Partridge* had moved to quash it; and now in support of the rule he contended, that the justice before whom this conviction was had, was not such a magistrate, as was under the statute authorised to convict: that he was a magistrate only within the division of a county; and consequently did not answer the description of any one of those persons, to whom this authority was delegated: that this statute, which gave the authority, was also the statute which created the offence; and consequently, that it could not possibly be contended, that the general jurisdiction of a justice of peace could attach upon it: that in the stat. 27 H. 8, by which [a] the King is empowered to make justices of the peace, it is directed, [b] that particular persons, viz. the Bishops of *Ely* and their temporal stewards, shall be justices of peace within the isle, and have all the powers annexed to the office of justice of peace in any county: that by this designation these persons are invested with authority and powers equivalent to those of the general justices of peace in the realm at large: but that these are the only general justices within the isle: and therefore that this power does not extend to common justices, who act only within the liberty of the isle; such magistrates not being justices of the county, or armed with their powers. That the statute of *Eliz.* was a new act, introductive of a new power, not before given to justices; and must therefore be construed strictly and not extended by any intendment: That the acts of parliament respecting the poor, which were meant to be general and to comprehend all justices, enume-

1783.

REX  
versus  
STEVENS.

“ as by any one such justice of peace of the said county where such offence shall be done without the liberty of any city or town corporate, or by such head officer or justice of peace within any city or town corporate, shall be ordered.” s. 1.

[a] Sec. 2.

[b] The words of the act are: “ That *Thomas*, now Bishop of *Ely* and his successors, Bishops of *Ely*, and their temporal steward of the isle of *Ely* for the time being and every of them, shall from henceforth be justices of peace within the said isle; and shall use and exercise all manner of things within the same isle, that appertaineth or belongeth to any justices of peace within any county of this realm of *England* to do, exercise and use, by virtue and authority that they be justices of peace, in as ample and large manner as any other justices of peace in any county within this realm have or might do, exercise or use.” s. 20.

R r rate



1783.

REX  
versus  
STEVENS.

rate the justices of *divisions* [a]: that the stat. 3 W. & M. which imposes a penalty upon churchwardens or overseers, neglecting to publish in the church notices of the residence of paupers, directs [a] that

[a] Doubts having in the case of several acts of parliament been entertained upon the construction of this word, I have thought fit in this place, to subjoin a modern authority upon the subject.

It is said by Dr. Burn in his observations upon stat. 43 Eliz. c. 2. in his Justice of Peace (1) that "in some of the ancient statutes, not now in force, as particularly the 22 H. 8. c. 12. the justices were required to *divide* themselves, for the better execution of the regulations concerning the poor. And thence came the clause in the subsequent statutes, that the justices of *the division* were to do such and such things. But as there is no law at present which requires them to *divide* for the aforesaid purposes, there is properly no *division* in the sense which the statutes intended; and consequently it cannot be necessary to set forth now, that the justices are *in or near* (2) *the division*": and in the case of an order of removal the objection, that the order did not state that the magistrates were of the division, has been (3) repeatedly over-ruled; the court saying, "that, as to this, the statute was only directory; and not restrictive or qualificatory."

The later authorities have confirmed this doctrine in the case of other legal instruments, as in that of a conviction (4) upon the stat. 2 G. 2. c. 28. s. 11. And yet this requisite, that the justices shall be *of the division*, is still continued: and upon this subject the necessity of its being so is (5) insisted upon by the legislature, and exceptions where that necessity did not appear so urgent (6) have been introduced, and this act as not imposing sufficient checks (7) has been in part repealed by a more modern statute, the general power left

(1) Vol. 3. 330. tit. Overseers. Edit. 1785.

(2) And in stat. 18 Eliz. c. 3. concerning bastards, where the words of the act are, "two justices in or next unto the limits where the parish church is," it was objected, that this being a particular power given to the justices of peace, it must be precisely pursued: And Wild, Justice, said, Several orders had been quashed for this exception; but contrary by Twissden and Rainsford. The parish and parish church is all one by intentment." M. 26 Car. 2. 1664. 3 Keb. 383.

(3) Anonymous M. 8 W. 3. 2 Salk. 473. Eliz. Ashley's case. Tr. 9 W. 3. Ib. 480. And Lord Mansfield in the case of the K. v. Loxdale and four others, said, "as to the justices *in or near* the parish or division. It is only directory." H. 31 G. 2. 1758. 1 Burr. fo. 447.

(4) H. 11 G. 2. 1737. Andr. 81. K. v. Bryan.

(5) In stat. 2 G. 2. c. 28. s. 11. after reciting "whereas many inconveniences have arisen from persons being licensed to keep inns and common alehouses, by justices of the peace who, living remote from the places of abode of such persons, may not be truly informed as to the occasion or want of such inns or common alehouses, or the characters of the persons applying for licences to keep the same," it was enacted, that "no licence shall be granted &c. but at a general meeting of the justices of the peace, acting in the division where the said person dwells, to be holden for that purpose on the first day of September yearly, or within twenty days after, or at any other general meeting of the said justices to be holden for the division wherein the said person resides."

(6) S. 12. Provides that nothing in that act shall extend to alter the method or power of granting licences, &c. in a city or town corporate.

(7) The stat. 26 G. 2. c. 31. s. 4., after reciting that the stat. 2 G. 2. c. 28. s. 11. had enacted, "that no licence shall be granted, &c. but at &c. or at any other general meeting



[a] that it shall be enforced by "any justice of the peace of the county, riding or division, city or town corporate, &c.": and that there is a difference between ridings and divisions in counties: that in stat. 8 & 9 W. 3. [b] the power of enforcing costs on appeals in cases of

1783.

REX  
versus  
STEVENS.

left (8) in the *sani* justices and the certificate directed to be signed by some neighbouring (9) justice; though in a recent case upon the statute 2 G. 2. it has been adjudged, that any justice within the county, acting within the division, is for this purpose a justice of the division.

Rex v. Sir John Powell Price, Bart.

M. 12 G. 3. 1771.

THE defendant had convicted a woman of selling ale in *New Town Montgomeryshire* without a licence. In fact she had had a licence, granted by two justices (both of them living out of the division, one of them till this occasion never acting there, and the other having occasionally only and in very few instances done so) at a meeting which the defendant and another justice of the division had appointed, but at which neither of them attended. The two justices, who came for that purpose, proceeded to business without the justices of the division, and granted licences to this woman and some others. Previous to the conviction the defendant consulted Sir Fletcher Norton upon the case: who being of opinion that the licence was void, not having been granted by two justices acting in the division, advised the conviction of the woman. She applied to the court for an information, which was granted; and the defendant was convicted at *Shrewsbury* summer assizes 1771 cor. Leigh, Serjeant, Judge of assize. At the trial there was some evidence of ill will from the defendant towards the woman; and the opinion of Sir Fletcher Norton was given in evidence for the defendant.

Beardcroft moved for a new trial on two grounds; and insisted, first that the defendant, having taken the opinion of counsel, under whose advice he had proceeded, could not be said to have acted maliciously; and, if erroneously only, could not be criminal. And secondly, that he acted legally, the licence being absolutely void, (10) not having been granted by two justices acting in the division. The serjeant who tried the cause, reported against him upon the first ground, and that there was evidence of malice; and the court thought the licence granted by the justices, though not those who generally acted for that division, was legal; for *per* Aston, J. Any justice of the county, going to the meeting in the division, is for this purpose a justice of the division.

ing of the said justices to be holden for the division wherein the said person resides" (which regulation, "by reason of the last mentioned provision, has been found by experience not to have the effect intended") then enacts "that the last before mentioned provision is hereby repealed; and that the day and place &c. shall be appointed by two or more of the justices acting for the division, by a warrant under their hands and seals, &c. directed to the high constable, &c. of the said division."

(8) S. 2.

(9) By s. 3. such certificate as aforesaid (i.e. under the hands of the parson, vicar or curate, and the major part of the churchwardens and overseers, or else, &c.) to be signed by some neighbouring justice.

(10) The contrary seems to have been the prevailing opinion in the case cited of the *K. v. Bryan*, *Leq. Ch. J.* "As to the point, whether a person acting under a bad licence incurs

3a

[a] c. 11. s. 5.

[b] c. 30. s. 3.



1783.

REX  
versus  
STEVENS.

of settlements is given to justices of the county, *riding*, city, *liberty*, town corporate, &c.: and in the same statute the clause, [a] that respects poor apprentices, speaks of justices for the *liberty or riding*: and that consequently the legislature must have supposed, that without these words the justices in general were not in these cases empowered to act: that there would on this account be no failure of justice, as the magistrates of the county at large have jurisdiction in the isle of *Ely*: that their commission is to act "as well within liberties as without;" and that it is so in this particular instance, though it is otherwise in such cities as have exclusive jurisdiction.

Sir Thomas Davenport, shewed cause against the rule; and insisted, that, if no other objection were made than that of want of jurisdiction in the magistrate, the court would construe remedially all acts meant remedially for the use of the whole kingdom; and that the jurisdiction must be supposed to be given, wherever the offence can be committed: that the words used by the legislature were put only as instances, and by no means used as an exclusive [b] enumeration of those only, to whom the trust was delegated: that a contrary construction would exclude from the benefit of this act large districts of *Lincolnshire*, and almost the whole county of *York*; where the commissions for the several ridings are different, and none of them for the county at large: that the stat. 15 Car. 2. c. 2. in the preamble, in which it recites the provisions of this act, states, that in such cases one justice, &c. "of the county or place where such offence was committed," shall interpose, &c.: that this is a legislative construction of the act; and consequently that the words "county, city, &c." are intended to include every thing that is any part of counties, &c.: that, if this were a particular

incurs the penalty, where the licence plainly appears to have been granted contrary to the act, it may perhaps be too much to say, that it ought not to be considered as absolutely void as to the party, as this is a particular kind of jurisdiction, and the words of the act are "null and void." But this is not the present question.

Page, J. If a licence is granted improperly, as by justices living out of the division, it is not void as to the person acting under it; who probably does not know the exact bounds of the division.

Probyn, J. If this point was now in question, it would deserve consideration, "whether the justices can punish a man by this statute, who acts under a visible authority."

[a] S. 5.

[b] This should seem to be so; for in the very first clause of the last cited act, stat. 8 & 9 W. 3, commonly called the certificate act, upon the subject of the certificate itself the word, "riding," is omitted.

act



act framed for any particular purpose, the narrow construction put on the other side might be supported; but that where its object is general, the words must be used only as instances; and that under the general names of the principal places every thing subordinate, every subdivision and smaller district, would be taken to be included.

Lord Mansfield.

I do not rest much upon the recital of the act of *Car. 2.*; but we must not put a construction upon this act wholly to defeat it: as would, if we adjudged this conviction to be illegal, be the case throughout the county of *York*. It must mean, the justices for that place in the county, where the offence is committed.

*Willes and Buller*, Justices, concurring,  
Lord Commissioner *Ashurst* was absent.

Rule discharged and  
Conviction affirmed.

1783.

REX  
versus  
STEVENS.

Trinity



# Trinity Term

23 Geo. 3. 1783.

Wednesday,  
June 25.

Rex v. Inhabitants of Upton Gray.

It is not necessary to the validity of an order of Filiation, that the putative father should be present at the examination of the woman before the two justices.

**T**WO Justices adjudge *Walter Nation* of the parish of *Froyle* in the county of *Southampton*, servant, to be the reputed father "of a female bastard child begotten on *Sarah Arundell*, and that the said child was chargeable to the parish of *Upton Gray* in the said county; and that he should pay, &c. and also one shilling weekly, &c."

Where a reason is assigned as the foundation of a judgment, all presumption or intention that the court went upon better grounds, is there excluded,

The sessions on appeal quashed this order and stated as follows: Upon hearing the order (as above stated) read, and what was alledged by counsel thereupon, and *it not appearing upon the face of the order, that the said Sarah Arundell was examined in the presence of the said Walter Nation at the time of making the said order*, this court is of opinion and doth adjudge, that the said recited order ought to be quashed; and the same is hereby quashed accordingly.

*Mingay* shewed cause in support of the order of sessions; and admitted, that he could not, upon any general principle or authority, maintain, that it was necessary to the validity of an order of Filiation, that the examination of the woman must be had in the presence of the putative father.

But



But he contended, that the reason given by the sessions, however erroneous, would at most be considered as surplusage: that all courts, having jurisdiction over the subject upon which they had pronounced, were intitled to every intendment in their favour: and that there might have been other reasons.

Lord Mansfield,

They give none. The presence of the putative father is not necessary before the justices out of the sessions; and, as the sessions have stated this and no other to have been the foundation of their proceeding, we cannot presume, that they went upon any other.

Willes and Buller, Justices, concurring,  
Lord Commissioner Ashurst was absent.

Rule absolute,  
Order of sessions quashed, and  
Original Order affirmed.

Rex v. Edward Pryse Lloyd, Esq;

Wednesday,  
June 25.

**B**OWER had obtained a rule to shew cause, why an order of the court of quarter sessions of the county of Carmarthen, (whereby it was ordered that Mr. Edward Jones, attorney at law, be employed to bring an information against the defendant for several crimes and misdemeanors committed by him in the execution of his office of justice of peace for the said county, and that the expences attending such prosecution be defrayed by the county) should not be quashed.

It was now moved to be enlarged.

Sed per Buller, J.

The *certiorari* ought not to have issued. It is settled in the case of [a] the *K. v. Lediard*, that a *certiorari* does not lie to remove any other than judicial acts.

Bower urged, that this act of the sessions was clearly illegal, and such an excess of their authority as it was impossible to support.

[a] *Mozz G. 2. 1751. Sayer 6.* It was the case of a *certiorari* to return what amounted to no more than the warrant of a magistrate, a ministerial act.

1783.

REX  
versus  
Inhabitants of  
UPTON  
GRAY.



1783.

REX

versus

LLOYD, Esq.

The court admitted this; but said, Then you may punish the justices for making it.

Rule discharged and  
*Certiorari* quashed.

Tuesday,  
July, 1.

A private  
building,  
always used  
as a chapel,  
and by con-  
tract never to  
be used for  
any other  
purpose, is,  
if a profit is  
made of it, rateable to the poor.

Robson v. Hyde, Esq. & al'.

**T**HIS was an action of trespass for breaking and entering the plaintiff's dwelling-house, &c. The defendants, as magistrates and officers acting under their orders, pleaded the general issue, upon which issue was joined. The cause came on to be tried before Lord *Mansfield* at the sittings for *Westminster* after *Easter* term last; when a verdict was found for the plaintiff, subject to the opinion of the court upon the following case:

That the mayor and commonalty and citizens of the city of *London* demised to the vicar and churchwardens of *Saint Martin in the Fields* a piece of ground in *Conduit Street* in the parish of *Saint George Hanover Square* with the chapel and vestry-room thereon erected for 40 years from *Lady-day* 1768 at the yearly rent of 18 *l.* 15 *s.* 0., with a covenant that the lessors should at the end of every 14 years at the same rent and under the same covenants execute a new lease of the premises from time to time for ever; they the lessees paying for every such renewal into the chamber of the city of *London* the sum of 131 *l.* 5 *s.* 0. by way of fine.

The case then stated an under-lease from *June* 24, 1776 from the churchwardens and vicar of *Saint Martin* to the plaintiff and two others of the same premises for 31 years and a half renewable for ever at the sum of 120 *l.*, clear of all taxes: The said under-lease among other covenants contained the following: "That  
" the lessees should let use and continue the present chapel, and  
" any new building to be erected instead of the said chapel, as and for  
" a chapel for the whole of the said term; and permit the service  
" of the church of *England* only to be used therein as by law  
" established, in like manner as the same hath been and is now  
" used and exercised therein, and not for any other use or purpose  
" whatsoever: and should pay to the clergymen and other officers  
" or servants officiating at, or belonging to, the said chapel, all  
" their



"their salaries and allowances: And also should defray all other  
 "charges and expences attending the support and maintenance of  
 "the said chapel or in any ways relating thereto; they receiving  
 "all the rents and emoluments from pews or seats in the said chapel  
 "from the 29 September 1776, &c."

1783.

ROBSON v.  
 HYDE, Esq;  
 & al.

That the plaintiff is the surviving lessee. That the rent reserved by the last mentioned lease has been always applied to the public and charitable purposes of the parish of Saint Martin. That the plaintiff lets the pews and receives the rent thereof for his own use and benefit; and the said building now is and ever since its erection, which was about 1695, has been applied to no other use than that of divine worship according to the rites of the church of England. That the parish of Saint George Hanover Square upon the 27th of April 1782 rated the plaintiff in respect of the said building to the relief of the poor; and the defendants distrained for non-payment of the said rate. That the said building never has been rated before.

The question for the opinion of the court is, whether the plaintiff in respect of the said building is rateable to the poor?

*Chambre* for the plaintiff contended, that he was not rateable under the *st. 43. Eliz. [a]* as occupier either of house or land: that, however the act might be extended by construction, it certainly was not the intention of the legislature to charge places of public worship: that the court has in many instances restrained the general words of a statute, as not being there meant in their largest and most extended signification: that such is the construction put upon the statute concerning church leases; where it has been holden that bishops cannot have been meant to be included [b] or they would have been mentioned: that with respect to this kind of buildings the construction of law ought to be the same; for they are not mentioned in the act: that not being to be found in the number of the objects of charge, they are not in point of law subject to it; and never having in experience or usage, never having in point of fact, been attempted to be charged, it is manifest they were never intended to be so. That if it be said that he makes a profit of the pews, it may be answered, that so do most of the clergy in such great towns as are places of genteel resort:

[a] c. 2. s. 1.

[a] Vide 2 Rep. 46. b. Sir W. Jones. 186.



1783.

ROBSON v.  
HYDE, Esq;  
& al'.

that the whole of the beneficed clergy derive a profit from the breaking of the soil to make graves, and for vaults and monuments in the chancel a very considerable one; and that no demand like the present was ever heard of on this account. But that it is not true that the plaintiff, like the clergy, is sure of a profit: that it is true, that he is bound to pay the clergyman his salary and the servants their wages: that whether his profits will even so far indemnify him cannot be ascertained; but that, how far soever they may fall short, it is not in his power to apply the building to any other uses: that, tho' this chapel was neither consecrated or endowed, yet as it was lawfully established, it was not to be distinguished from the case of any church, in which the parson makes a profit of his pews; and that this was the first instance in which an attempt had ever been made to assess a place of public worship according to the rites of the church of *England*.

That under the above circumstances the payment of the sum reserved was not in the nature of a rent: and that to say the contrary would be to discourage religion; as dissenting meeting-houses, tho' also legal, could not otherwise be supported: and that it had been adjudged [a], that a house, converted into a conventicle and used for no other purposes, was not rateable to the poor.

*Batt* for the defendants insisted; that, tho' the particular facts in this case might have never come before the court, yet the principles on which they must be decided were well known and established; and as old as the *stat. 43 Eliz.*: that the rule is, that whatever yields a permanent, annual, profit is a proper object of taxation: that it is so laid down in all the books: that the plaintiff is lessee, and by the express terms of his lease collects the money paid for the pews: that here then is a beneficial lease, out of which arises a permanent revenue.

That with respect to the occupation, if the plaintiff is not the occupier, who is? that he is occupier as much as the subject will admit of occupation; and occupation can only be considered with reference to the subject-matter. That he is at least as much so,

---

[a] H. 1 G. 2. 1727. Anonymous. Cases of Settl. 126. Copied from thence into Vin. Abr. tit. Poor. 426.



as a parson who lets his tithe: that the case of [a] the *K. v. the Inhabitants of Saint Thomas in Southwark* was expressly in point: that it had decided, that a preacher of a meeting-house, who does *not* let the pews and does *not* thereby make a profit, is not rateable or chargeable as occupier any more than any of his audience: that this case is totally different from that of a church, which is a public building, and where, upon any deviation from the purposes of the institution, abuses would be remedied by the ecclesiastical courts: that this is on the contrary a mere private building, the application of which to its present and proper purpose could only be enforced by the restraining covenants: that whatever the plaintiff did with it, he could not be criminal: he could not be pursued by ecclesiastical censures: that his conduct would only be regulated by mercantile ideas, by a consideration of profit and loss: that, if he pleased, he might turn it into an auction-room: that it was constructed for the purpose of gain, and considered and transferred as other property. But it is by no means clear that a parson is not rateable, if he makes a profit of his pews: he is expressly so for his other property: and why not for this? but it has been urged, that this is a novel attempt, and unheard of before: that the reason why the question has not occurred till of late, is that it is but of late times and from the great increase of buildings and population in the places of public resort in this country, that the building of chapels is become a common adventure, and an object of speculation to individuals; and that the charges for the maintenance of the poor having become every day heavier had made men look round to every object from which profit may be derived. That he might admit the law of the case which had been found in *Viner*, as it was perfectly consistent with his argument: but that it certainly was a very loose note and taken from a book of little or no authority.

*Chambre* urged in reply, that the proper subject matter of a rate for the relief of the poor had been very truly represented to be a *permanent* profit: \* but that the present was on the contrary altogether *casual* and *uncertain*. That he also readily adopted another idea suggested on the other side, as it furnished him with another plea of exemption. That it had been stated, that the undertaking of these

1783.

ROBSON v.  
HYDE, Esq;  
& al.

[a] H. 13 G. 2. Stra. 745.



1783.

ROBSON v.  
HYDE, Esq;  
& al'.

buildings was a matter of speculation and that they were mere *adventures*: that it had been holden that taxes upon adventurers, whose profits are uncertain, are hard, and that they are [a] therefore excused; and that the legislature probably meant [b] in order to encourage men to proceed in works of public utility, to exempt them: and that they thought it would be dangerous to discourage adventurers by subjecting them [c] to a tax.

That as to the question asked, who is the occupier if the plaintiff is not? it is enough for me that the plaintiff is not. That nothing is more clear than that the plaintiff cannot legally apply this chapel to any other purpose than that of religious worship; and that the court will never presume misconduct and breach of covenant.

*Lord Mansfield.*

The doubt in this case can only have arisen from the use of the word "chapel"; but this building is not such in an ecclesiastical sense. It is not a consecrated place, the ecclesiastical law cannot take notice of it. It is a mere private room, let out it is true at present for the purposes of religious worship; but which at his pleasure the owner may apply to any other use. It is said indeed, that he is restrained from doing this by covenant; but the restriction by covenant does not vary the nature of the property. If indeed it were absolutely given to the public, it might be a strong ground to say that it was not rateable; in his hands at least, out of whom the property had passed, and by whom nothing is reserved. But the temporary use to which it is applied cannot vary the nature of the case. He might convert it into an assembly or concert room; and in that shape would it not be rateable? under this then, the most beneficial, mode of enjoyment shall a plea of exemption be admitted? If another, and that clearly a more lucrative one, were once suggested, the lessor and lessee would presently understand each other; and the argument from the restrictions of the covenant would not long continue a bar to the establishment of this charge.

[a] Lord Mansfield in the case of Rowlls v. Gell, and al.' E. 16 G. 3. 1776. Cowp. fo. 453.

[b] Lord Mansfield in the case of the Governor and Company for smelting down lead, &c. v. Richardson, esq. and others. M. 3 G. 3. 1762. Burn's Justice. vol. 3. 591. MS. This case is also reported in 3 Burr. 1341. and 1 Blackst. 389.

[c] Ib.



*Buller, J.*

The argument on behalf of the plaintiff is supported by a false analogy. His case does not resemble that of a clergyman. But, if it did, I am very far from being satisfied, that a member of the established church, a parson or vicar, who has the profits of the pews given him by the parish in increase of his benefice, is not rateable for such profits. There is also another important difference. One reason, that the law has continued tithes to the clergy, is that it has prohibited their following any other occupation: now the plaintiff is subject to no such restrictions. And to mark the difference still more strongly, every beneficed clergyman in the kingdom, even the poorest of our vicars, (and many there are whose pittance is only 20*l.* a year) pay their proportion to the poor. No principles of law then, any more than the interests of religion, prevent the public from calling upon this man for his full proportion.

*Willes, J.* concurring,  
Lord Commissioner *Ashurst* was absent.

*Postea* to Defendants.

*Vide* the case of the *K. v. Waldo, Esq;* in this Term, *post.*

*Atkins & al' v. Davis & al'.*

Wednesday  
July 2.

**T**HIS was an action of trespass for taking the plaintiff's goods. The defendants, as constables, pleaded the general issue, upon which issue was joined. The cause came on to be tried before Lord *Mansfield* at the sittings for *London* after *Trinity* term last at *Guildhall*; when a verdict was found for the plaintiff, subject to the opinion of the court upon the following case:

does, any particular taxable object, or refer at all to that statute, all persons, having personal property within the district assessed, are inhabitants; and as such rateable.

That the plaintiffs are trustees of the company of the proprietors of the *London* bridge water-works; and it was admitted that they were intitled to bring this action.

Under the construction of the riot act, which speaks of ability in general and does not specify, as the stat. 43 Eliz.



1783.

ATKINS & al'  
versus  
DAVIS & al'.

That the company is not incorporated; and that their property consists of

- 1st. Their offices, with the wheels and works for raising the water.
- 2d. A wharf, called *Mault's Wharf*.
- 3d. A house for the use of their secretary, detached from their works and wharfs.
- 4th. A fire engine, used for raising the water to a proper height, also detached: and
- 5th. The pipes, trunks, branches, &c. laid and dispersed in the different streets, not only in the city of *London* but in the county of *Middlesex* and borough of *Southwark*, for the conveyance of their water.

That the whole of this property is within the ward of Bridge Within; except the works with their pipes, trunks and branches on the *Southwark* side of the river, and except such parts of the pipes, trunks and branches, as are a continuation from the pipes, trunks and branches within the said ward and which are from thence dispersed in the different streets out of the said ward, and out of the said city of *London*, but are all originally derived from and connected with the pipes, trunks and branches within the said ward.

That the whole profits arising from the water-works, and which consist of rents paid by the persons supplied with water from the said works, amount to 2,500*l. per annum*: out of which 276*l. 10s.* is collected in the ward of Bridge Within, and the rest of the said profits is collected elsewhere within the city of *London*, borough of *Southwark*, and county of *Middlesex*.

That all these receipts are accounted for by different collectors at the above-mentioned office, where the books and accounts of the said company are kept, and all the business of the said company transacted. But *the money so collected is paid* into the hands of a treasurer residing *without the ward*.

*The land-tax  
act of the year.*

That the proprietors of the said company are rated at 2,500*l.* to the land-tax, for their shares only, by virtue of *21 G. 3. c. 3. s. 57.* by the commissioners of the city generally; and pay the sum assessed upon them to a particular collector appointed by those commissioners. But that the other property of the said company is rated by the commissioners of the said ward, and the sum assessed thereupon is paid to the collector of the said ward.



That the damages and costs, payable by the city of *London* to the several plaintiffs in respect of several actions brought against the inhabitants of the said city on occasion of the late riots, amount to 28,299*l.* 17*s.* 7*d.*

1783.  
ATKINS & al'  
versus  
DAVIS & al'.

That at a general quarter sessions of the peace holden for the city of *London* the 15th of *October* 1781, the court made the following order: "This court, upon request duly made and according to the directions of the several statutes in such case made and provided, doth hereby assess and tax *rateably and proportionably* all and every the parishes within the said city of *London* and liberties thereof, to and towards an equal contribution to be had and made for the relief of the said several defendants against the said several executions, and for payment thereof; and also for payment of their said several just and necessary expences which they have been at in defending the several actions aforesaid in the proportions following: that is to say (amongst other wards)

"The several parishes in the ward of Bridge Within }  
"or so much thereof as is in the same ward." } £760

"And the said court doth hereby order, require and command the respective constables of each of the wards within the said city of *London* above-mentioned, that they or some or one of them do forthwith *rateably and proportionably* tax and assess according to their abilities every inhabitant and dweller in the several parishes within the said respective wards for and towards the payment of the respective sums of money above mentioned, and levy and collect in the several parishes within the said wards the several and respective sums of money above specified, within thirty days from the date hereof: and that they the said constables of the said several and respective wards, and such and every of them, who shall have so levied and collected the several and respective sums of money hereby ordered to be taxed and assessed, levied and collected, upon the inhabitants and dwellers in the several parishes within the several wards aforesaid respectively, do and shall, within ten days after such collection, pay and deliver the same by virtue of this order, and subject to the disposal of this court pursuant to the several statutes aforesaid, into the chamber of the city of *London*, in the joint names of the said *William Plomer* and *James Adair* and *Edward Reynolds* Esquire, deputy clerk of the peace of the said city, taking a receipt or receipts



1783.  
 ATKINS & al.  
 versus  
 DAVIS & al.

"receipts from the clerk or officer in the said chamber of London,  
 "who shall receive the same; which shall be his and their suf-  
 "ficient discharge for all and every the monies so to be paid as  
 "aforesaid."

"Signed

Watkin Lewis, Mayor.

Wm. Plomer.

Nathaniel Newnham."

That the defendants were constables of the said ward, and did tax and assess the said proprietors at the sum of 145*l.* 16*s.* 8*d.* being at the rate of 1*s.* 2*d.* in the pound on 2,500*l.*, at which they are so rated to the land-tax to the city of London: And that the several inhabitants of the said ward were also assessed at the rate of 1*s.* 2*d.* in the pound on the several sums at which they are respectively rated to the land-tax collection within the ward; in which last assessment the proprietors were included, being rated for *Mault's* wharf, the secretary's house and fire engine (which are detached property) as follows: *Mault's* wharf 11*l.* 13*s.* 4*d.* secretary's house 1*l.* 11*s.* 6*d.* and fire engine 2*l.* 6*s.* 8*d.*

That the distress in question was made on the property of the proprietors on account of the non-payment of such sum of 145*l.* 16*s.* 8*d.* at which they were assessed on account of their shares.

That the plaintiffs paid all such money as they were assessed at in respect of *Mault's* wharf, the fire engine and secretary's house.

That the proprietors never paid to any ward rate in respect of any other property than *Mault's* wharf, the fire engine and secretary's house; nor paid any rate whatsoever for their shares or property on account of which the distress was taken, but by virtue of the act 21 G. 3. c. 3. s. 57.

That the shares or profits of the *Hampstead* water-works, New River Company, King's Printing-house, Offices of Insurance from fire, Excise-office, and of other companies in the city of London, which are rated to the land-tax by the same clause in the act 21 G. 3. with the *London* bridge water-works, were not assessed towards payment of the said sum of 28,299*l.* 17*s.* 7*d.*

The question for the opinion of the court is, Whether the plaintiff is intitled to recover?

This case was twice argued. In *Michaelmas* term last by *Williams* for the plaintiff, and *Law* for the defendant; and in *Hilary* term last by *Davenport* for the plaintiff, and *Law* for the defendant.

It

Tuesday  
 Novem. 19.

Tuesday  
 Jan. 28.



It was a question upon the riot act, 1 G. 1. st. 2. c. 5. s. 6., which refers itself to the statute of [a] hue and cry; and for the plaintiffs three points were made. 1. That this was not such a species of property, as is by law rateable at all. 2. That no property of any description, unless locally situated in the parish or ward within which the assessment is made, can be a legal object of taxation. 3. That the directions of the act of parliament not having been pursued, the respective proportions of the persons charged have not been truly adjusted; and therefore that on that ground also the rate was void.

1783.

ATKINS & al.  
versus  
DAVIS & al.

And they insisted, 1. That this was not such a species of property, as is by law rateable at all. That it was contrary to all usage to rate profits; especially those of an adventure which are from their nature uncertain, as being perpetually subject to risque: That even in cases attended with no hazard, inquiries into the usage have been directed by the court; and that circumstance has formed the principal ground upon which that part of the court, which held the property not rateable, seemed [b] to rely. That property of a similar nature had not ever been made the subject of charge, either in the instances of the *Hampstead* water-works or New River Company. That in the case of [c] *Rowlls v. Gell & al.* the great ground, upon which the charge was supported, seems to have been, that there was "no possible risque." That if this property is liable, that of a man who carries water about the streets must be so. And is it the cart or the pump that is to be made the subject of charge? That the cart is equally in daily use; and the difference between them is only, that the cart, as a less complicated machine, is infinitely less liable to accident.

2. That no property of any description, unless locally situated in the parish or ward within which the assessment is made, can be a legal object of taxation. That by the words of this statute, "people dwelling in, &c. *inhabitants* and residents, *inhabitants* "and dwellers" are the only persons described as liable to this charge: that the words of stat. 43 *Eliz.* are *inhabitants*; and that both acts being in *pari materia* must be taken together and receive a similar construction: that they, who neither live in a parish or

[a] 27 *Eliz.* c. 13. s. 5.

[b] M. 20 G. 3. 1779. *Jones v. Maunsell.* Dougl. 289. and vide the *K. v. the Inhabitants of Cardington.* E. 17 G. 3. 1777. Cowp. fo. 583.

[c] E. 16 G. 3. 1776. Cowp. 451.



1783.  
 ATKINS & al.  
*versus*  
 DAVIS & al.

pay their share to its burthens, are not in any sense its *inhabitants*; that in the case of [a] the *Harwich* light-house the sole reason given for that decision by the court, after much deliberation, was, that "the tolls were not locally situated in the parish, and therefore not "rateable there:" that this case was in point: and that not one penny of the sum assessed is even *paid within* the ward, but to a treasurer living *out* of it; and that the only pretence to charge it in the ward is, that the office for transacting business is within it: That eight parts out of nine of the sum assessed arises from the profit of pipes and branches lying within the city of *London*, borough of *Southwark*, county of *Middlesex*, &c. and not locally within this ward; and therefore that the inhabitants of this ward are to that extent over-rated. And suppose a riot in *Southwark* or *Middlesex*, where a large proportion of this property is collected, shall it be said, that this property cannot be made a subject of charge, cannot be made to contribute there? that it should here and should not there, is equally unreasonable and illegal.

3. That the directions of the act of parliament not having been pursued, the respective proportions of the persons charged have not been truly adjusted; and therefore that on that ground also the rate was void. That the 5th section of the stat. 27 *Eliz.* to which the riot act as to this purpose refers, directs, that this assessment shall be made *rateably and proportionably*: that the sum now levied has been rated and collected in the manner, in which the general land-tax is rated and collected upon landed property: that that has been done by the officers of *the city* generally, who have never rated or collected any other than the land-tax: that it is true, that by a particular statute 21 G. 3. these shares or profits are subjected to the land-tax; and that in this particular instance and for this purpose these shares are assessed by the same officers, by the officers of *the city*: but that they are not authorised to intermeddle in any other instance or for any other purpose; for that in all others the taxes are rated and collected by the officers of *the ward*: that this newly assumed power has in this instance been exercised by *the city* officers in a manner injurious and unequal: that they have not charged any other inhabitant, any *individual*, for

---

[a] M. 12 G. 3. 1771. R. v. Martin Rebowe, Esq; Bott. 384.



any part of their personal property; or even, as the case finds, any of the other *public companies*: that this charge therefore cannot be supported as *rateable and proportionable*; and that the whole sum which has been rated upon the real property of the plaintiffs within the ward, upon that property which in the hands of others has not been under charge, has been paid.

1783.

ATKINS & al'  
versus  
DAVIS & al'.

For the defendants it was insisted, that in this action the first question that had been made by the plaintiffs could only be gone into: that here, where there could be no appeal, the action should have been for an excessive distress: and that, where there was a right to take part, exceeding in the quantum could not make the plaintiffs trespassors.

That, with respect to the first point, the engine was a local visible property, fixed to *London Bridge* within the ward: that it was solely by the operation of the engine, that the water was distributed through the whole extent of the works; and that this engine was wrought altogether within the ward. That, subject to whatever risque or expence it could be fair or reasonable to estimate, a clear gain to a vast amount was as certain, as the flux or re-flux of the tide and the wants of mankind. That in the construction of the word "inhabitant" both in the statute for the repair of decayed bridges by [a] Lord Coke and in this very act by [b] Lord Hale, he who "hath lands or tenements in his own possession" is such: that these shares are in legal construction a tenement: that the case of [c] the *K. v. the Inhabitants of Cardington* was in point; for there the toll was not paid within the parish, any more than in the case before the court: and that, if this property is not rateable here, it cannot be rated any where.

But that (be this as it may and even tho' the whole without the ward were not) such part at least of this property, as lies within the ward, must be rateable; and that will be sufficient to intitle the defendant to judgment.

It was insisted in reply, That, with respect to that point upon which an answer had been attempted, the authority relied upon had not the smallest application; as in the *Cardington* case the sluice, for the passage through which the demand of toll was made,

[a] 22 H. 8. c. 5. 2 Inst. 702.

[b] E. 24 Car. 2. 2 Saund. 427.

[c] E. 17 G. 3. 1777. Cowp. 381.



1783.  
 ATKINS & al'  
 versus  
 DAVIS & al'.

lay within the parish which had assessed it: and that, with respect to the difficulty or pretended impossibility of rating this property elsewhere, it was as easy to rate the sums paid for water, in the parishes where they were paid or in which the charge arose, as the rents of houses in the parishes where houses stand. [a]

That, with respect to the objection made to the action, where-ever, as here, the jurisdiction, and not the rate and property is exceeded, every one is a trespasser; and that this therefore is an illegal, and not merely an excessive, distress: that the true state of the point was, that the defendants had not taken too much on a right rule; but by a rule different from that which they profess to act by, and by a wrong one.

Buller, J.

But how can you take advantage of this proceeding in an action? 'Tis true, there is no appeal; but if the order is irregular on the face of it, why not remove it by *certiorari*? If the *certiorari* is taken away, are not we bound, are not we precluded from trying the merits of the rate in an action?

*Curia advisare vult.*

Tuesday,  
 February 11.

Lee stated to the court the result of his enquiries respecting the mode of rating the *Yorkshire* navigations: he said, that the *Aire* and *Calder* navigation was rated only at the two extremities, at *Leeds* and *Wakefield*: that they were rated at *Wakefield*, by the name of the proprietors of the navigation, at 1200 *l.* and paid about 120 *l.* per ann.; which was a third part of the poor rate for the whole town. That they paid to all other town rates except the street-

[a] The st. 22 & 23 Car. 2. c. 15. (for the maintenance of the clergy of those parishes in the city of *London*, which were burnt in the fire of the year 1666, in which fire the church of *St. Magnus London Bridge*, which stood in the ward in which this question arises, was destroyed) subjects "waterhouses (which waterhouses shall pay in their respective parishes where they stand and not elsewhere) to a proportionable assessment with all other hereditaments in the parish: and the annual land-tax acts, since the year 1709, direct the assessments upon the tolls and duties belonging to the proprietors of the great *Yorkshire* navigation to be made in no other towns, thro' which the navigation runs, than the towns of *Leeds* and *Wakefield*. *R. v. the undertakers of the navigation of the rivers Aire and Calder*. M. 29 G. 3. 1788. 2. Durnford and East, 660.

From hence it should seem, that without such special provision this property must in the idea of the legislature have been assessable in those parishes, in which its several branches and dependencies lay, or thro' which a passage was made. Sed vide the case above cited; tho' nothing was there positively decided, except that the justices are, generally speaking, the proper judges of the quantum; and that, unless the inequality of the rate appears manifestly and necessarily upon the state of the case, the court will not disturb it.

tax,



tax, imposed a few years ago; and that they had paid down 300*l.* <sup>1783.</sup>  
to be exempted from that charge.

The court having looked into the land-tax act of 1 G. 3. found, <sup>ATKINS & al'  
versus</sup> that the *Yorkshire* navigations and the *London* bridge water-works <sup>DAVIS & al'.</sup> were assessed by that act; and that the stat. 21 G. 3. was copied from it. And they now directed an enquiry with respect to their payment to the land-tax from the earliest period.

It appears from the state of the case of [a] the *K. v. the Undertakers of the navigation of the rivers Aire and Calder*; that they were made navigable by stat. 10 & 11 W. 3. c. 19. anno 1699, amended by stat. 14 G. 3. c. 96.: that the tolls and duties had been rated to the poor at *Leeds* and *Wakefield* from the year 1713 and at *Wakefield* from the year 1759 (and at no other places) for the whole navigation at 1200*l.* a year: and that in every land-tax act since the year 1709 (ten years after the act passed for making them navigable) a clause is inserted, that no assessment shall be made upon them to this tax in any other towns, through which the navigation runs, than the towns of *Leeds* and *Wakefield*.

The court ultimately differing, the Judges now delivered their opinions *seriatim*, as follows: <sup>Wednesday,  
June 2.</sup>

*Buller, J.* (after fully stating the case.)

This case has been twice argued and several objections made to the rate upon this property.

But the general, and I think the only real, question in the cause, is, Whether this property is rateable in its nature?

The statute of 1 Geo. 1., which is commonly called the *Riot Act*, directs, "That a rate shall be levied and made upon the inhabitants of the "hundred, city or town in such manner and form and "by such ways and means as are provided by the statute made in "the 27 *Eliz.* c. 13."

The statute of the 27 *Eliz.* directs, That the justices shall tax "all towns, parishes, villages and hamlets, towards an equal contribution; and after such taxation made, the constables, &c. shall "tax according to their abilities every inhabitant and dweller in "every such town, &c. towards the payment of such assessment." *s.* 5.

[a] M. 29 G. 3. 1788. 2. Durnford and East 660.



1783.

ATKINS & al'  
versus  
DAVIS & al'.

Every man's ability to pay depends upon his property.

The only question therefore upon the merits and substantial justice of the case is,

What property are the plaintiffs possessed of?

The answer to this question appears upon the case to be this:

That the wharf is worth 11*l.* 13*s.* 4*d.* *per annum*; that they have a secretary's house of 1*l.* 11*s.* 6*d.* *per annum*; a fire engine worth 2*l.* 6*s.* 8*d.* *per annum*; and they have water-works worth 2,500*l.* *per annum*.

They are rated for all this property in the same proportion as other persons are rated for their property; and they ought to pay for all this, unless some legal objection or exemption can be made against it.

For not only the express words of the statute, but the true principle of taxation, requires that every man should pay according to his ability, or in other words according to that which he has. And no man, who can be brought within the letter, spirit and meaning of the act, ought to be exempted; because the exemption of some throws the heavier burthen upon others, whereas all burthens of this sort ought to be as equal as possible.

But, it is objected, that the shares in the water-works are not rateable.

First, because they are subject to great risque and expence, and therefore the value is uncertain.

Secondly, because they have never been rated before.

As to the first objection, it is not made out in point of fact; for there is not a word stated in the case about any risque or expence.

The property stands confessed to be of the annual value of 2,500*l.*; and the profits are as certain as the profits of any real property can be. There must necessarily be some expence about such works, but, notwithstanding that, they appear to be of the value of 2,500*l.* *per annum*.

There is a great expence and a great uncertainty as to the clear produce in all cases of land and of houses too: but that was never thought to be an objection against their being rated.

In the case of land there is great expence of plowing, manuring and sowing; and after all that is done, there is a great uncertainty as to the *quantum* and value of the property.

That



That depends upon the goodness or badness of the season, and in some years there is no crop at all ; as the farmers in many parts of *England* knew by experience in the course of last year, when they were obliged to plow up again the land which was sown. So in the case of houses, it is uncertain what expence is necessary in each particular year. Still the owner is rateable in respect of them.

1783.  
ATKINS & al'  
versus  
DAVIS & al'.

If it is said, the land or house is still of such annual value, notwithstanding the produce is not the same every year ;

The same answer will hold in this case : and upon the facts here stated I must take it, that these works will let for 2,500*l.* *per annum, communibus annis*, notwithstanding the expence upon them.

The case of *Rowlls v. Gell* is not so applicable to the present, as the counsel for the plaintiffs would wish to have it considered ; for there it was expressly stated, the duties were uncertain and varied every year, and yet they were holden to be rateable. In that case it was admitted by the court, that lead-mines were not rateable, and yet the owners of the duties upon those mines were held rateable ; though it was uncertain whether they would receive any profit or not.

If they receive no profit, of course they could not be rated : and therefore the question in all those cases is,

Whether the property does produce any profit or not ?

Till it does yield a profit, it is not rateable : but the moment it does yield a profit, it becomes a fit object of taxation.

The reason why lead-mines are not rateable, is not, because of their risque or uncertainty ; but because the statute of 43 *Eliz.* having mentioned coal-mines only, has been deemed virtually to exclude and except all other mines : and so it was held by the court in the case of the Governor and Company for smelting lead against *Richardson*.

As to the objection of non-usage and that this property ought not to be rated, because it never had been rated ; I was a little surprised to hear the case of *Jones* and *Maunsell* cited as an authority to prove, that usage ought to govern : for no such point was there decided, nor indeed was any thing decided in that case ; for the court, materially differing upon the merits of the case, granted a new trial,



1783.

ATKINS & al'  
versus  
DAVIS & al'.

First. That the facts might be more fully stated, and  
Secondly. To give the parties an opportunity of getting a special verdict, and so to carry the matter to the last resort.

Usage in no case can make law against an act of parliament: In many cases it may be material to be enquired into, because the words of a statute may be doubtful, and there may have been a long and uniform usage under the act: there usage may serve to shew what is the true construction of the act, and is considered as a contemporary exposition of it: but then the usage must be general and extend to all cases within the like reason; for usage cannot authorise one construction of the statute in the north and another in the western part of the kingdom.

Usage had no effect in the *King and Cardington* or *Rowlls and Gell*.

In the *King and Cardington*, *Palmer* was seised in fee of the navigation of part of the river *Ouze* and all the tolls of coal, and had the power of erecting sluices and taking tolls there. *Palmer* did not reside in *Cardington*, nor had any persons there to receive the tolls; but they were paid at *Barton* or *Eaton*. This river was navigable, and the tolls were received for above one hundred years; but it was never rated to the poor. The court held *Palmer* rateable in respect to these tolls: yet he had no property either in the soil or in the water: he had merely a power of erecting sluices and taking tolls: the sluice neither did yield or was capable of yielding any natural produce of itself.

A house yields no natural produce of itself; and yet a man is rateable in respect of it.

The plaintiffs have the same property in the trunks and pipes as *Palmer* had in the sluice; and they have also a separate property in the water: they have, and for one hundred years past must have had, as settled valuable property as any man can possess.

It is true, that during that time they never have been rated; but the same circumstance, as I observed, occurred in the *King and Cardington*. There it was expressly stated, tolls were paid for one hundred years, but they had never been rated. Upon enquiry it appeared in that case, there were fourteen sluices in the river and only one ever rated, and a great majority of sluices throughout the kingdom were never rated at all; but, notwithstanding that, the rate was holden to be good.

In



In *Rowlls v. Gell*, the duties in question had never been assessed before, though the Duke of *Devonshire* had paid for the like duties in other places. It appears by the additional state of this case, that the property in question has always been rated and paid to the land-tax.

1783.

ATKINS & al'  
versus  
DAVIS & al'.

It is true they have been rated by name; but, if they had not been expressly mentioned, yet there does not seem to be any doubt, that they would be rateable under the general words of the first of *W. & M.*, which words are: "all other yearly profits and hereditaments of what nature or kind soever."

The manner they are charged to the land-tax is material to be attended to; for they are not taxed at any gross sum, but at 4s. in the pound for their full yearly value, as all lands are: and therefore the legislature have proceeded upon the idea, that these water-works produce some clear annual value.

The use I make of their being rated to the land-tax is, that it decidedly proves, the property is such as is rateable in its nature; and that it is capable of producing a certain yearly value: but, supposing they had not been rated or rateable to the land-tax, I don't think that would have governed this question: for the land-tax specifies almost every thing by name; and, if these works are not mentioned and therefore not rateable, it by no means follows, that under the general words "every man is to be rated according to his ability," the plaintiffs will not be liable to this rate in respect of this property.

Mr. *Davenport* said, if the water was carried in carts instead of pipes, the pump would not be rated for the value of all the water, carried from thence.

If that is so, it will go a great way towards deciding this question in favour of the plaintiffs. There is no difference with respect to a man's carrying water to a place where it is consumed. Whether it is carried in pipes or in carts is quite immaterial. But I hold in the case put, that the pump would be rateable to the value of all the water carried from thence: for the pump is the permanent visible property; and the quantity of water carried from thence constitutes the produce of the pump.

Suppose a gardener contracts to serve twenty families, and carries all his crop to their different houses, certainly he would be rateable for the whole of his garden, where his garden lies.

U u

In



1783.

ATKINS & al.  
versus  
DAVIS & al.

In the *King* and *Miller* [a] which was cited, *Skillicome* demised to *Miller* at a certain place near *Cheltenham* four acres of ground, in which was a well of water, called *Cheltenham Spa*, at the rate of 100 l. per annum. The case stated is, the lands and buildings, independent of the well, were worth one hundred pounds annually: the rent paid was 80 l.: and the profits arose from the mineral water and the sale thereof: and the company, resorting thereto, which was very various and uncertain, made up the rest.

The court held, the spring was rateable for the produce of it.

That was the only question in the case and upon which the court gave any opinion. Nobody doubted about the lands or buildings and the value of them: and the value of the well was distinctly stated, in order to bring that question before the court; who held that the occupier was rateable for the whole one hundred pounds a year.

The water, and the profits arising from it, was what was there rated. The labour was as requisite to draw and bottle the water in that case, as it is to collect it in the present; but that did not prevent the rateability. In order to get coals, great labour is necessary. Engines and other machines must be used. There is a considerable expence attending it, and the profit uncertain; but yet coal mines are expressly rateable by the words of the statute: which shews the circumstance of labour being or not requisite was not the line adopted by the legislature. In the case of the *King* against *Miller* you will observe also, the profits were stated to be various and uncertain; and so they are in all cases of tolls: but no point is better settled, than that tolls are rateable.

That does not rest upon the authority of *Keble* only; but that case is recognized and allowed by the court upon all occasions.

Enquiries were made by my Lord's direction in the course of some cases pending in this court; and it was found, that the tolls at *Wickham* had been rated ever since they were taken: and the *King* and *Cardington* and other cases have been founded upon that principle.

This is a visible, permanent, property, yielding profit; and as such, I think rateable.

---

[a] Tr. 17 G. 3. 1777. Cowp. 619.



The second objection to it was, that, supposing the property rateable, yet the rate is bad, because the constables have taxed more than they ought to have done; as many pipes, trunks and branches lay out of the ward, and even out of the city.

In answer to this, first, I am of opinion, the whole property is rightly rated within the ward.

Secondly. If not so, as some part of this water, with its pipes, &c. is within the ward, it is rateable there: and, as it does not appear upon the face of the rate, that any thing out of the ward is rated, this objection cannot be made in this action.

The objection applies only to the *quantum* of the rate.

First I say, the whole property is rightly rated within the ward. The source of the property is there: the water is collected there by means of the fire-engine and other works fixed there; and there it first becomes the property of the plaintiffs. When the water is once collected by means of the fire-engine and brought within the plaintiff's lands or buildings, it is as much private property as the land itself. Whatever is done afterwards is only for the purpose of vending that property to a greater advantage.

But secondly, supposing the plaintiffs ought not to be rated for the whole produce of the water where the source is, that objection is of no avail in this action.

The plaintiffs are rated for the water-works: they have water-works within this ward, for which they are liable to be rated: therefore the objection goes only to the *quantum* of the rate.

The legislature has vested the power of apportioning the rate in the hands of the justices and constables; and their determination was final and conclusive.

Wherever an appeal is given at the quarter sessions against a rate, the determination of the justices as to the equality of the rate is conclusive: and, where the legislature think fit to vest such a power in any set of persons without appeal, it must also be conclusive.

There is no case, in which it is more necessary that their determination should be conclusive, than the present: for, if it be not so, the inconvenience will be monstrous.

If the justices or constables made a mistake of one shilling in rating only one person too high or too low, the whole rate would be void; and every person rated might maintain an action.

1783.

ATKINS & al.  
versus  
DAVIS & al.

U u 2

If



1783.

ATKINS & al.  
versus  
DAVIS & al.

If a justice or a constable exercise a discretion, which the statute has placed in their hands, corruptly, they must be punished criminally for so doing; but still the rate must stand: and you cannot investigate property or equality in an action, unless there is a total want of jurisdiction or the rate is void upon the face of it. What I have just said is an answer made to the last objection by Mr. *Davenport*: namely that the constables have gone by a wrong rule.

Therefore upon the whole, in my opinion there ought to be judgment for the defendants.

*Asbburst, J.*

This certainly is a question of very great general concern: and it does seem to me that in a doubtful case usage ought to have great weight allowed it.

It is expressly found, this is the first attempt to rate property of this kind; though the statute for making the hundred liable is as old as the time of *Elizabeth*.

Therefore the usage in this case does seem to be general, and to have so obtained in every part of the kingdom with respect to such property.

There are a vast number of water-works, particularly in this metropolis. The rule has been held in all: there are a vast number in other parts, in *Gloucestershire* for example; and no instance has been shewn us, in which in any part of the kingdom, works of this kind have ever been rated.

This would at least make one very cautious in establishing a new precedent; and in my opinion it is not enough to say, this is in effect valuable property, and therefore ought to pay.

If we were sitting here in a legislative capacity, that argument would certainly have great weight; but it is our province *jus dicere, non dare*. This must be governed by the same rule as the case of rating to the poor; as the words of the 27 *Eliz.* and 43 *Eliz.* are nearly similar.

And it seems to me this species of property ought not to be rated under those statutes.

It clearly would not be rateable under the words of 43 *Elizabeth*, so neither does it seem to me to fall within the meaning or spirit.

The meaning of the legislature seems to me to be, that the occupier should be rated in respect to things yielding a certain profit, and not where the profit is *uncertain* and depends upon constant labour and expence.

*Mr. Justice Ashurst  
ag't the rating.*



There seems to be good policy in exempting such kind of property; as it is an encouragement to adventurers upon hazardous undertakings, by which, if they do succeed, the public are materially benefited: and the moment they have succeeded, if their property was to be charged with a rate of this kind, certainly it would be a great discouragement to such enterprizes.

1783.

ATKINS & al'  
versus  
DAVIS & al'.

I should be glad to know, what part of this property is rateable?

The first projector of water-works we all know was ruined by it. Suppose he had lived long enough for it to have yielded some profit. Would you forget all the expence he is at before he is reimbursed? Who is to keep the account and strike the ballance?

All these difficulties prove strongly to me, that these uncertain profits were never meant to be rated. 3

As to the cases upon the subject, the whole tenor of the authorities certainly run strong the other way.

In the *King* and *Vandewall* [a] rents and casual profits of a manor were held not rateable; and yet, as to these things which are uncertain, you may certainly set an average price upon them, taking the average of a given number of years. Upon that average you might strike a ballance and say, rate them at so much, because in ten years they have produced it: but they have been held not rateable.

In the *King v. Richardson* [b] certain parts of the lead ore were liable. In respect of lead-mines the question made was, Whether they were liable to be rated to the poor? It was held they were not.

The determination says, the act mentioned only coal-mines, which is in exclusion of all other mines.

In the *King* and *Rebow* a light house was held not rateable, though a considerable revenue is raised by them, upon this principle, that the profits were uncertain and depended upon the expenditures.

In the *King* and *Shallfleet* [c] a salt-office was held not rateable.

[a] E. 33 G. 2. 1760. 2 Burr. 991. 1 Blackst. 212.

[b] M. G. 3. 1762. 3 Burr. 1341. 1 Blackst. 389.

[c] H. 7 G. 3. 1767. 4 Burr. 2011. Bott. 46.



1783.  
 ATKINS & al.  
 versus  
 DAVIS & al.

In 3 *Kemble* 540. Tolls were held rateable 'tis true: but in the first place I hold that to be a book of no great authority. My brother *Buller* said it was recognized in subsequent cases. At all events it does not appear what the nature of the tolls were. It might be for piccage; that is in the nature of a rent for the land: for this is an acknowledgment in respect of the use made of the land, payable to the owner of the soil. There might be some reason for it, if in the nature of a rent paid for land: but I am not satisfied with an authority, which without some such facts stated does not appear to me to be warranted upon principle.

As to *Rowlls* and *Gell* and the *King* and *Cardington*, I happened to be necessarily absent when those cases were determined; therefore I cannot precisely say upon what reasoning the court went, as the ground of their determination. As to *Rowlls* and *Gell*, the lessee of the mines was rated for lot and cope, which is a certain portion of the ore paid by adventurers to the lessee, without any risque at all run by him. That might possibly be the ground of that determination.

That is not the case here. Here the party has no certain profit. Suppose the pipes burst, or the engine burnt, or any accident of that sort should happen to it?

If the engine is burnt, he might not have any profit at all for twelve months; before which time it might not be reinstated. Therefore certainly the contingent profit of an engine, which depends upon constant labour and expence and if any accident should happen might be rendered totally useless and unproductive for twelve months, is not like the case of *Rowlls* and *Gell*; where the party at all events received part of the ore himself, being at no labour or expence: therefore that might be a ground for that determination.

I have said, that in the case of the *King* and *Cardington* I was not present, I cannot therefore say what arguments were submitted to the court.

But I cannot help saying under my present ideas, I should have been under the necessity of differing, when that judgment was given; there being a great number of precedents the other way.

I am not for extending the law. If it is necessary to alter it, the legislature are to do it, in whose province it more properly falls than in ours. Therefore I am of opinion, there should be judgment for the plaintiffs.

Willes, J.



As the case has been fully stated and the authorities commented upon at large by my brother *Buller*, I mean to say little more than that I entirely agree with him in opinion, that these water-works are rateable property.

1783. *M. J. Willes*  
for the rating.  
ATKINS & al'  
versus  
DAVIS & al'.

Many objections were taken to their rateability.

First. That the profits are uncertain, and there is great risque; nothing of that sort is stated in the case. Indeed property of all sorts is liable to change its value, as houses and lands; but this is never considered as any objection to rateability.

In *Rowlls* and *Gell*, the lot and cope produced 500 l. a year some years: many years it varied; but was holden rateable.

Tolls of markets, ports or navigations, and many other species of property are held rateable; though the value is uncertain and changeable.

In this case no objection is stated to the value of the property: which is stated to yield 2,500 l. a year, and has paid at the rate of 4 s. in the pound land-tax upon this calculation.

This is not like the case of *Jones* and *Maunsel*, where, though the degree of herbage and pannage might be uncertain, it might be rateable; though not judicially determined so. The rule was not denied in *Robson* and *Hyde* [a], that where the subject matter was a valuable, permanent advantage, it was rateable and taxable.

The second objection is, this was never yet taxed; and it is innovation to burthen it by a new duty in the quality of a taxation.

That every man should be rateable according to his ability is looked upon as sound and good policy. Before the 43d of *Eliz.* coal-mines were not rateable, nor for many years afterwards. Many new schemes of improvements, till they became valuable, were omitted to be taxed; and yet taxed afterwards.

A house is rated, as soon as built, without regard to the building: so these things, when they become valuable, are the subject matter of taxation, without considering expences in the original scheme.

The tolls of markets were held rateable, as said in 3 *Keble* 540. in *Charles* the 2d's time; and the same case is reported in *Freem.* 419.

[a] In this term, ante p. 310.



1783. It was there said by the Court, that there was a toll time out of mind, but it was never taxed to the poor, though liable to taxation. So *Freeman* and *Keble* agree. Now it is universally known, they are liable to taxation.

ATKINS & al.  
versus  
DAVIS & al.

Personal estate is hardly ever taxed; yet in some instances taxation of personal property is allowed.

In *Robson v. Hyde* yesterday, we allowed for the first time a tax of a chapel erected since 1695, which never paid before.

In the *King* and *Cardington* sluices erected for 100 years were determined rateable, though they had never paid before. This has been denied to be law by my brother *Ashburst*; though it was the unanimous opinion of this Court in his absence.

Upon the authority of these determinations, I conceive, that the circumstance of this property not having before been rated, is no objection to its rateability.

The next objection is, that from the nature of the subject itself, these water-works are not rateable. That the property consists in the use of the water, and the mechanical instruments and pipes used in raising and conveying it; but that the proprietors have neither the soil above nor the soil below the pipes; and that the pipes are the property of the trustees of the water-works.

I admit that: but the water upon which the profit arises, is a subject rateable; and was so determined in the *K.* against *Miller*, in the case of the *Cheltenham Spa*. It appears from stat. 5 W. & M. c. 10. s. 57. and *Maitland's* history of *London*, p. 160, that these water-works were granted by indenture from the city of *London* in the 25th of *Eliz.* to *Peter Morris* for a term of years.

*Maitland* says, *Peter Morris* was a German, and that these water-works are still the same, as are performed by the present machine in the arches of *London* bridge. He says, that the Lord Mayor and the city of *London* for his encouragement granted *Morris* the use of one of the arches of *London* bridge for the water-works: but, one machine not proving sufficient for raising the water, his successors had more arches granted for erecting more engines, five in number. This grant contains a licence to erect engines, and it contains a grant of two plots of ground, and also a lease for 500 years on a reserved rent, with a grant of three arches of *London* bridge to erect machines.

This is not a property arising from the ingenuity merely of a man's head, or the work of his hands: the above therefore are to me conclusive arguments of rateability.

But



But suppose the fact not to have been as is just stated: suppose there had been no reservation of rent upon a lease, if the determination of the *King* and *Cardington* is right, it would not have varied this case.

1783.

ATKINS & al'  
versus  
DAVIS & al'.

In that case *Palmer* had not the water or soil under the letters patent or act of Parliament, but only a right in the navigation and a power of erecting sluices and so forth.

As I understand this is to be turned into a special verdict, I shall forbear to say more. As all the profits ought to be liable to the burthens of the public, and as they are as certain as the rents of lands, I am of opinion they ought to be rateable: and the consequence of this is, judgment ought to be given for the defendants.

Lord Mansfield.

L<sup>d</sup> Mansfield  
as to rating.

In this as in the other [a] case, both points being of general and extensive consequence, we have taken great pains to come to a certain and satisfactory conclusion. We have not only conferred, but we have exchanged our doubts in writing; and, there still remaining doubts, it does honour to the Court in my opinion, that we should each give his own opinion.

The case has been very fully and very correctly stated, and therefore I will come to the question directly.

The whole turns upon the nature of the thing, concerning which the question arises. That thing is not land, house or tenement: whatever the plaintiffs have of that sort is separately and particularly rated; the wharf, the secretary's house, and the fire-engine.

It is not stated, that the plaintiffs have any property in the water or soil of the river. They can have no property in the water. The water of the river is common and free as the air, till by labour a part of it may become property. Individuals may so acquire it.

It is not stated, that they have any property in the land, under or over which the wheels, trunks and pipes are laid. It is most probable, though their title is not stated nor any thing concerning it, that they have only a liberty to lay them.

These pipes and trunks cannot by any cultivation be made to yield any produce of themselves: they are the mechanical

[a] Robson v. Hyde & al'. yesterday.



1783.

ATKINS & al'  
*versus*  
 DAVIS & al'.

machines, engines, instruments or tools, which the plaintiffs use in performing the labour of raising and conveying the water of the *Thames* to the houses of those who hire and employ them.

Now I take it, that the profits, made merely by the ingenuity of a man's head or the work and labour of his hands with or without mechanical tools, are not a rateable property within the 27th or 43d of *Eliz.*

Any argument from the word "inhabitants", which is in both statutes, and the words "according to their ability" which are expressed in the first statute and necessarily implied in the other, proves too much.

It proves, the more a lawyer or a physician or a porter or a carpenter earns by his labour, the more he is to pay.

But by constant usage (and I know not upon what other ground it is) ability to pay is measured by the local, visible property in the parish: and in this case the plaintiffs may, for any thing that appears, not be inhabitants: they certainly are not rated as inhabitants, but as occupiers of property rateable.

The Court upon the 43d of *Eliz.* has paid great regard to the construction put upon it by usage; and have often directed inquiries into such usage, and in my apprehension very rightly for many reasons. The words of the statute are very loose and very general, and they may be construed into any latitude, even to make all a man has and all a man gets in any way the measure of his ability: for, truly and substantially, it certainly is so; but usage has explained it and narrowed it: and I know nothing of any usage that says, a man shall pay according to his ability in the obvious common sense of the word, *i. e.* all he gets or makes by his efforts or abilities. If this were the rule, every profession would be liable to be taxed for all they get upon an average: their profits may be ascertained upon an average, as much as the bridge water-works. If we don't find it there, I know of nothing but the words of the statute, to prevent taxation being carried to that extent.

Another reason why usage should have great weight is, it is law in daily execution, and every body is interested to the extent of the contribution: and therefore, where a species of property for 200 years has never been looked upon as rateable, it is a strong contemporary exposition of the statute.

The



The business of raising, collecting and conveying water from rivers or springs for the supply of houses upon all occasions existed notoriously in this kingdom before the reign of *Elizabeth*, and have ever since. For it occurs to me, the *Hampstead* water-works depend upon the act of *Henry 8*: so that they must have existed notoriously before the time of *Elizabeth*. And there are a great many other instances of profits, accruing from some of these undertakings, which have been very great, and notoriously have appeared to be great from the price of the shares which they have sold at; and yet to this hour it never has entered into any man's head to think them rateable to the poor. They have been bought and sold ever since the 43d of *Elizabeth*, as not liable to that burthen.

1783.

ATKINS & al'  
versus  
DAVIS & al'.

I don't care (indeed I am afraid judicially) to make such an extensive innovation in property, contrary to the sense of mankind for 200 years. The argument of equality is very captivating. The policy of extending every tax is very wise; and I have given way to it in some determinations, which have gone farther upon principles than express precedents warranted: but I recollect none, where a species of profit, never rated before, has been held rateable. I mean those late determinations, that have been alluded to: and I entirely agree, it is no argument to say, that this or that individual thing has never been rated.

That may happen from a variety of accidents; but the question is, Whether the particular species of property throughout the whole kingdom has never been rated? For whatever comes within the general rule of rateable property, is *a thing* rateable, and yet particular *species of things* may not be rateable. There is a great difference, in point of fact as well as in legal consequence, between the circumstance of *particular persons* not having been ever rated though possessed of rateable property, and that of *a species of property* having never before been rated any where throughout the kingdom. For the purpose of exemption it is not enough to say, this particular man has this particular thing belonging to him; if it comes under the general description. Now it appears to us, that this particular species of profit, arising from collecting water from a navigable river and conveying it to the houses of individuals who pay for it, has never been rated.

In *Rowlls & Gell* the duties on lot and cope were a rent, that was paid to the owners of the inheritance of the fee for that pro-



1783.

ATKINS & al'  
*versus*  
 DAVIS & al'.

fit: and, though it happened particularly that in that special instance they had never been rated for lot and cope, yet at the next door in the very same county, the Duke of *Devonshire*, who has a lease of many mines under the Crown, had been rated, and consequently was rated: they both lay in *Derbyshire*, in the very same county.

In the *King and Cardington* Mr. *Palmer*, or they under whom he claimed, had not been rated, but tolls had been rated; and that case of the tolls at *Wickham*, so long as above 100 years ago, the 22d of *Charles 2*, held them to be so.

And I remember upon the former occasion [a] the authority of *Keble* being doubted; and, that which my brother *Willes* has now found of *Freeman* not having then been discovered, I sent to *Wickham* to know how the fact was. The answer was, they were rated and had been beyond the memory of man; from the 22d of *Charles* the 2d, a great way beyond the memory of man. That supported the report of *Keble*.

It is most certain, that in this very river one sluice was rated, and the navigation tolls all over the kingdom are rated; and lately before us in the case of [b] the rivers *Aire* and *Calder* they were rated.

The *Cbeltenham* spring was rated by the produce of the land: the rate went only by the quantity of rent it paid; so much for the profits of the land. A lime-stone quarry, or a marl pit, or a salt spring is the same: it goes, as the mere value of the land: then the appellant was lessee of the land, which land produced a particular commodity. That raised the value of the land, just like a lime-stone quarry, or a marl pit, or a salt spring, that adds to the value.

The determination of yesterday has been mentioned as an authority, that usage does not wholly guide. Now that determination went upon the most general, most universal principles, that can exist; *i.e.* that a man, the lessee of a house which pays a rent and yields a profit, is rateable to the poor. That was the determination: tho' set apart for the performance of divine worship, the Court held, the use it was applied to, being for the purpose

[a] In the case of *Jones v. Maunsell*.

[b] E. 23 G. 3. 1783. The company of Proprietors of the navigation of the rivers *Aire* and *Calder*. It was a question, whether warehouses (which the owners of lands adjoining to the navigation might build and let) were rateable to the poor.



of profit, made it rateable. The usage was not at all material: it was there nothing to the purpose. It was no chapel in the proper sense of the word; but a room where people were permitted to come and say prayers and hear sermons; and not a chapel of ease or a church. This was the only use the lessee applied it to; and therefore it was held rateable upon the most general principles in the world: and there is no case of any exemption whatever founded upon such an usage: where the lessee makes a profit of the pews of a chapel, such a use will subject him to charge; and here no usage shall exempt him.

It may be just, when these undertakings had taken fast root, that they should be distinguished from the profits of labour in general; but I don't foresee, and I have turned it very much and with great anxiety in my mind, I am not able to foresee, where the reasoning of the words "inhabitants", "and according to their ability" may carry us. I protest, I don't know where to draw the line: for these are the only words of the statute; and there is nothing in the statute to narrow or qualify them. It will go to every thing that makes a man rich.

Every land-tax act since the revolution (and here is a defect in the case, for the case only mentioned the last land-tax act, but that has been admitted since) every land-tax act since the revolution has subjected many of these water-works to raise, collect and convey water, severally and specifically by name, to the land-tax in proportion to their profits.

The legislature would not trust to any general words to take them in; but they have (thinking it just in the particular cases I have mentioned before) they have by special description said, how they should be rated according to the average medium of their profits.

It don't follow, that therefore, and because they are so taxed to the land-tax, they are liable within the 27th or 43d of *Elizabeth*.

The land-tax act subjects offices and salaries; yet an officer is not liable, in respect of his office or salary, to be rated to the poor of the parish where he lives; as was determined in the case, alluded to by my brother *Ashburst*, of the Salt-office: he is not rated for his salary or the price of his labour. Nay, on the contrary it is very strong, that ever since the revolution, which is now very near 100 years, though the *New River*, the Bridge Water-works, the *Hampstead* water-works, and other works were so notoriously

1783.

ATKINS & al'  
versus  
DAVIS & al'.



1783. *ATKINS & al<sup>r</sup> versus DAVIS & al<sup>r</sup>.* notoriously pointed out in the land-tax act, though the profits were ascertained to a very large amount, and tho' the poors rates have long risen to a grievous height, no man ever imagined that they could be rated to the poor.

Water-works are numerous all over the kingdom. This appears from the particular mention of them in the land-tax act; and all that I am going to mention are taken from the land-tax act. There are water-works in *Southwark*, *Westminster*, *Colchester*, in *New Windsor*, in *Exeter*, in *Shrewsbury*, (and perhaps an hundred more, but I take these as mentioned in the land-tax act) and yet plaintiffs have not been able in a single instance throughout the whole kingdom to shew, that this species of property was ever rated. If in other parts of the kingdom this had been rated, though omitted in *London*, the usage would not have had that weight it has with me; because under this state of facts we are now introducing as a subject of charge a species of property, notorious ever since the reign of *Elizabeth* and before, and which by the sense of all mankind has been considered as not liable.

The subject matter here rated is certainly the profits and gain made by labour, and not the engine, or the water, or the arch of the bridge; for the leave to make use of an arch of the bridge don't give any property in the arch of the bridge; and the engine, which raises the water, is rated separately.

The plaintiffs then have a licence to do what? To fix a fire-engine, which is separately rated: for what is done is done by labour, assisted with trunks and pipes to raise the water, and to carry it to the houses of people who employ them.

If then the rule contended for should be established by the judgment of this Court, I really do not know where to stop, and where to draw the line. And I am the more alarmed, because I see every new case not only determines itself, but consequences are drawn from it and applied to others; although Lord *Bacon* says, *consequentia consequentia* is no good argument. New cases furnish other new cases going still farther, and arguments to support new attempts. I protest therefore I cannot see where to draw a line, that is founded in good sense, or where to stop, unless we stop here. If the meaning of the legislature is this, that every man should be taxed according to his ability, let that be as it may, that is a strong sense and a clear principle: but it would



make a great innovation: I protest, I don't know where it would go. 1783.

I allow (and as I have said more than once, I cannot speak it too often) I allow the principle of justice and the principle of policy; that taxes should be equal and extensive. But there is no end of the use that may be made or the consequences that may be drawn from supposing, that the annual profits of labour (with or without tools) ascertained upon the average, or those of ingenious mechanical inventions, are property rateable. What should the line be? If any one of the machines has any fixture upon land or upon the soil, I don't know where to draw the line.

ATKINS & al'  
versus  
DAVIS & al'.

I am therefore for adhering in judicature to the unanimous sense of mankind, ever since the statutes were made.

I say nothing of the question, whether these profits, if rateable, should be all rated in Bridge Ward, or in the several parishes where they arise and are paid; because in this action, as it is clearly explained by my brother *Buller*, the quantity of assessment is not material.

The consequence of this is, you must by consent turn your special case into a special verdict; and in that special verdict, if there are any omissions in the case, according to truth they may be supplied; but you must turn it into a special verdict: and, if you vary the case by your special verdict, the Court may be applied to: if you don't vary it in the opinion of the counsel upon both sides, you may take judgment either way. It is only with a view to bring in a writ of error.

The special case having been by consent turned into a special verdict, and the parties having also agreed, for the purpose of carrying the cause in course of appeal to the Court of Exchequer Chamber, that judgment should be entered for the plaintiffs; the special verdict was twice argued before that Court at Serjeants Inn: in *Trinity* term 1784, by *Law* for the plaintiffs, and *Williams* for the defendants, in error; and in *Michaelmas* term following by *Wilson, J.* for the plaintiffs, and Sir *Thomas Davenport* for the defendants, in error.

Argument on  
the case in the  
Excheq. Chamber.

Tuesday  
June 15.  
Monday  
Novem. 22.

*Law* for the plaintiffs in error insisted; that this property was a legal subject of taxation, for the maintenance of the poor: that the true sense of the statutes made for their relief must be the rule of



1783.

ATKINS & al.  
*versus*  
 DAVIS & al.

of construction in the present instance : that they clearly meant to embrace every possible property : that they were in their nature prospective : and that, whatever the mode of acquiring or whatever the denomination of the thing acquired, if only it constituted *ability* in the proprietor, it subjected such person to the charge.

That it had been urged as a ground of exemption, that this property was exposed to great hazard and severe losses ; but that it was not pretended, that there was not *ability*, ample and abundant, beyond any possible calculation of loss : that wherever such contingency arose, an allowance ought and would be made for it ; but that here, in respect to *quantum* in this point of view, not a syllable of argument or evidence had been used : that the profits were *certain* and not *casual* or in the nature of any of the cases cited upon that head : that it was true, they were not certain in their amount, neither was the lot and cope in the case of *Rowlls v. Gell* ; and yet this property was holden rateable : that not only the tolls of markets, but of the sluices of navigable canals, a property in every view similar to the present, have been holden [a] to be a proper subject of charge : that if, in the case of a discovery, ingenious in its principles, difficult and hazardous in its execution, and also of great public utility, it be asked, *at what period* it might be just in the public in the first instance, to insist upon this charge ? I answer that, after this property has by the legislature itself in the land-tax acts been subjected to this charge for near a century, and the proprietors have during the whole of that time submitted without a murmur to the payment, it does not in such a case as this seem very reasonable to impeach the exercise of discretion in the plaintiffs and to bring forward under such circumstances the idea of too early a day. But that, at any rate if the subject matter here is chargeable, a court of law cannot withhold its sanction to the charge. That an argument, which appears to have had most weight with one of the Judges was ; that there did not appear, if this charge could be supported, to be any discernable limit of taxable objects : that every species of personalty would become subject, every article that a man has ; that it would go to his profession and trade, to every thing that makes him rich : that, even

---

[a] Cowp. 581.



If this were so, it was the legislature only, that could apply the remedy, it could not prevent the Court from pronouncing the law: but that, if the argument were placed in its true point of view, there was no analogy between this representation of things and the state of the present question: that, in the usual mode of acquiring property in professions or trades by the hand or the head, there was nothing that continued visible and local; nothing fixed, as the fire-engine, pipes and trunks; nothing, out of which the profit arose, perpetually and almost inseparably attached and annexed to the soil: and that to subjects such as these, the doctrine of usage, which has been so much insisted upon, has never been applied.

1783.

ATKINS & al.  
versus  
DAVIS & al.

That the whole was properly assessed in the ward, in which the whole was paid, and the business done: that it was so regulated in modern practice at *Fulham* and *Putney* bridge: that now the tolls are taken in both parishes, they are rated alike at 700*l.* each, in each parish; and that while nothing was collected at the *Putney* side of the bridge, the whole was assessed at *Fulham*: [a]

That most of the great and permanent objects of taxation are mentioned in the stat. 43 *Eliz.*: that every thing valuable was meant to be subjected: and that by analogy to the decisions in the case of mills and sluices the present must be adjudged to be rateable, as a visible local property within the ward. [b.]

*Williams* for the defendants in error argued, as follows:

It is a question, that of late years has been frequently agitated, and has not yet received a final decision, whether personal property in general, and that even where the amount is clear and certain, be rateable or not? [c] In many instances it has been adjudged not to be rateable [d]. In some it is true it has been held rateable; but then it has been adjudged to be so even in these cases upon the ground of *usage* only. [e.]

[a] In a note on the case of *Jones v. Maunsell*. M. 20 G. 3. 1779. Dougl. fo. 292.

[b] I have not thought it necessary to state a second time the authorities cited from Lord Coke, Saunders, &c.

[c] *Rex v. Inhabitants of Ringwood*. Tr. 15 G. 3. 1775. Cowp. 326. *Rex v. Inhabitants of Witney*. E. 10 G. 3. 1770. 5 Burr. 2634. 2 Blackst. 709. Bott. 34. *King v. the Guardians of the poor of the city of Canterbury*. H. 9 G. 3. 1769. 4 Burr. 2293. *King v. Churchwardens of Andover*. H. 17 G. 3. 1777. Cow. 564.

[d] *King v. Rebowe*. M. 13 G. 3. 1772. Bott. 384. Cowp. fo. 583. K. B. *King v. Vandewall*. E. 33 G. 3. 1760. 2 Burr. 991. 1 Blackst. 212.

[e] *Rex v. Cardington*. E. 17 G. 3. 1777. Cowp. 581. *Rex v. Francis Hill*. T. 17 G. 3. 1777. Cowp. 613.



1783.

ATKINS & al'  
*versus*  
 DAVIS & al'.

The present is a particular case, and differs from any that has been hitherto discussed upon the general question; the question now submitted to the consideration of the Court being, Whether a particular species of property, in no single instance by any usage ever yet rated, being also profits, and profits of a very hazardous adventure, in the first instance requiring an immense capital and afterwards attended with constant risque and expence, is in the possession of the defendants in error, who are not inhabitants, a property rateable within the meaning of the 27th and 43d of *Elizabeth*.

First then I shall submit to your Lordships, that this property, having in no instance by any usage ever yet been rated, ought not in point of law to be considered as rateable under the statute of *Queen Elizabeth*.

From the word "inhabitants" which is used in both statutes, and the words "according to their abilities" which are expressed in the 27th and necessarily implied in the 43d of *Elizabeth*, it has been contended and strongly urged, [a] that a man is rateable to the extent of all his estate, both *personal* as well as real. However from the time of the making of those statutes until the present, whenever the general question has been discussed, whether personal property, without any modification of it, be rateable or not, the Court have generally intimated, that if the plea of exemption could in any respect be supported, the principal and leading ground was, the great inconvenience and confusion that would necessarily follow an adjudication, that subjected it to charge. And it has been urged on this side of the question, that had not this argument prevailed, it would be impossible to say, where the reasoning from the words "inhabitants and according to their abilities" would end: that they are the only words used in the statutes, and that there is nothing to narrow or qualify their loose and general sense; but by usage they have been confined to a certain and determinate sense, and that sense has been uniformly adopted by the Court of *K. B.* in their determinations: that the rule is, that if personal property has been *usually* rated in a parish, the Court upon the fact of usage only [b] support such rate; and

[a] *King v. Churchwardens of Andover. King v. Francis Hill.*

[b] *King v. Francis Hill. King v. Rodd. H., 22 G. 3. 1782. Ante 147.*



if the usage has been *not* to rate such property, there the rate is not supported. This was determined in a modern case, that of the *King* and *Francis Hill*; and has since been considered as so thoroughly established, that in the case of the *King v. Rodd* H. 22 G. 3. (the usage as to not rating personal property being stated on the authority of the case of *King v. Hill*) the point was yielded at the bar without argument. And in all the numerous cases on these statutes inquiries are always directed to be made about the *usage*; which is considered as the best expositor of their true meaning and construction.

With respect to this case of the *London* Bridge water-works, the verdict finds that they had never been rated before; and, as this species of property is to be found all over the kingdom, the Court of *K. B.*, according to their constant course of proceeding as I have before stated, after the first argument directed enquiries to be made among the other water-work proprietors, whether any of them had been rated before: the Court at the same time declaring that if any of the other water-works in the country had been rated, though omitted in *London*, they should hold these also liable; because the usage in these cases must be uniform. The result of this enquiry was, that no single instance could be produced throughout the whole kingdom of any one of them having been ever rated; though the *Hampstead* water-works had existed ever since the reign of *Henry* the 8th, and many of the others also at a very early period; and those which are at present the subject of your Lordships consideration for upwards of 200 years. The usage here then has been long, uniform and universal over the same species of property, and this circumstance will doubtless have the same weight with your Lordships in this case, as it has uniformly hitherto had in the construction of doubtful statutes in other cases; especially as this case is not as those other cases were, a question whether *personal property in general* is rateable; but whether a particular species of property, consisting of profits, and those profits of a very hazardous adventure, in the first instance requiring an immense capital and afterwards attended with constant risque and expence, be rateable?

And I farther submit to your Lordships, that, if in any case whatsoever uninterrupted usage ought to be considered as a contemporaneous exposition, it ought more peculiarly to be so in the

1783.

ATKINS & al'  
versus  
DAVIS & al'.



1783.

ATKINS & al.  
*versus*  
 DAVIS & al.

case of that property, which has always been of such immense, ostensible value, and which uniformly lay in the neighbourhood of great towns and cities, the residence of active minds, from its value and from the grievous magnitude of the poor rate, deeply interested in the discussion, and who must therefore have been presumed to have been fully satisfied that such property could not be liable, or they would not have failed to have brought that subject under discussion: especially as at the time of the creation of this property, which was near the time of the 43d of *Elizabeth*, cases are reported in the books to have been adjudged upon the rateability of different species of property, much less an object in point of value; and therefore so much less likely to produce a struggle.

In particularizing the authorities which I have alluded to on this head of usage, I shall take leave to state the principle as laid down by my Lord *Vaughan*. In his report [a] in delivering the opinion of the Court of C. P. he says, "That, where the penning of a statute is dubious, *long usage* is a just medium to expound it by: "for *jus et norma loquendi* is governed by usage; and the meaning of things spoken or written must be, as it hath constantly been received to be, by common acceptation." The modern authorities agreeable to this principle are, *The King and Vandewall* [b] where Lord *Mansfield* in delivering the resolution of the whole Court says, "So far as appears to the Court such rents and profits, (which were quit-rents and not attended with any risque) had never been attempted to be rated before, and there is no colour for the attempt now, after more than a century and a half from the making of the act upon which it is grounded." It is hardly necessary to observe to your Lordships, that here no attempt has before been made, and that here more than two centuries have elapsed. In the case of the Governor and Company for smelting down lead against *Richardson* [c], inquiries were directed to be made among all the other lead-mines to know whether they were rateable. In the *King v. Gardner* [d], it is laid down, that the *usage* under the statute of the 43d of *Eliz.* is very

[a] Sheppard v. Gosnold & al'. H. 23 & 24 Car. 2. fo. 169.

[b] 2 Burr. 991.

[c] M. 3 G. 3. 1762. 3 Burr. 1341. 1 Blackst. 389.

[d] Tr. 14 G. 3. 1774. Cowp. 85.

material;



material; for great care must be taken to get at certainty in determinations, and to avoid overturning settled practice. If corporations have been *usually rated* all over the kingdom above a century, there will be little inconvenience in adopting *the usage*. In the *King v. Churchwardens of Andover* [a] it was laid down by the Court, "That it would be material to state what has been the *custom of rating*. If the *usage* should be to take in stock in trade, there would be very good right to support it."

1783.

ATKINS & al'  
*versus*  
DAVIS & al'.

In the *K. v. the Inhabitants of Cardington* [b], the Court after the first argument ordered the case to stand over to another term, *that inquiries might be made as to the custom of rating that species of property in other places*.

In the *King v. Francis Hill* it was adjudged, "That where it had been the *usage* in a parish to rate persons to the poor for their stock in trade within the parish; such persons are liable under the statute of 43 Eliz." In *Jones v. Maunsel* [c] on the rateability of herbage and pannage, the Court after the argument directed inquiries to be made on both sides in order to discover, whether there was any instance of such property being rated in any part of the kingdom. I have already troubled your Lordships with the *King v. Rodd*, which upon the authority of the above case of the *King v. Francis Hill* was not thought maintainable at the bar: and, in giving his opinion in this case, Mr. Justice Buller, though he thought this property rateable, admitted, "That *usage* in many cases may be material to be inquired into, when the words of a statute are doubtful and there has been a *long and uniform usage* under the act; for it serves to shew what is the true construction of the act, and is considered as a contemporary exposition of it: but then it must be *general* and extend to *all cases* within the like reason." The case before the Court falls precisely within this rule; for the inquiries directed have found the universality of this usage throughout the realm.

A farther argument, that this principle of law which I have been now labouring, is well founded, seems to arise from the provisions of the legislature itself in *pari materia*. This usage of

[a] H. 12 G. 3. 1777. Cowp. 565.

[b] E. 17 G. 3. 1777. Cowp. 581.

[c] Dougl. 289. M. 20 G. 3. 1779.



1783.

ATKINS & al'  
versus  
DAVIS & al'.

rating personal property, referred to in the highway acts, and the assessments imposed by them for the purposes of repairing and making highways and bridges, are confined in these words, "*such as has been usually rated only.*"

By the statute 22 Car. 2. c. 12. s. 10. for the repairing of highways and bridges, it is enacted, "That one or more assessment or assessments upon all and every the inhabitants, owners and occupiers of lands, houses, tenements and hereditaments, or any personal property usually rateable to the poor within such parish shall be levied, &c."

By stat. 2 W. & M. c. 18. for paving and cleansing the streets in the cities of London and Westminster, it is enacted, "That for the better mending of the highways, one or more assessment or assessments upon all and every the inhabitants, owners and occupiers of lands, houses, tenements and hereditaments, or any personal property usually rateable to the poor, within any of the said parishes shall be levied, &c."

By the stat. 3 W. & M. c. 12. for the repairing and amending highways, it is enacted by sect. 17. & 18. "That no assessment for the purposes therein mentioned should exceed the rate of 6d. in the pound of the yearly value of lands, houses, tenements; nor of 6d. in 20l, of personal estate, usually rateable to the poor."

This is a declaration by the whole legislature, that assessments for purposes so beneficial and of such general public good as the making of bridges and repairing of highways shall be confined to personal property usually rateable only: And I conceive I am well warranted in contending, that it serves as a legislative exposition of the statutes of Elizabeth.

The act of Parliament out of which this question arises, and which was made for the purpose of throwing the burden and expence of all damages incurred by riots upon the inhabitants of the hundred, who under the impressions of a sudden panic have not properly exerted themselves in prevention of such outrages, ought not by construction to be made to speak in stronger terms than the legislature has thought fit to express in the act of 43 Eliz.; which is not in any respect a penal act, but framed merely with a view to civil regulations. If then upon those statutes it was questionable, to what extent personal property was liable, this must be received as an exposition of the legislature that no personal property, even

in



in the case of the poor laws, could be subject to this taxation; unless under the usage and the force of custom. Will then your Lordships in this case extend the line laid down by your Lordships predecessors in the several authorities, and by the legislature in the several statutes, I have cited? and against *a long and uniform usage* from the 27th of *Eliz.*, and against the sense of all mankind from that period to the present, now for the first time decide, that this is a species of property rateable?

2. I shall in the next place submit, that this, being a species of property, consisting of *profits*, is, as such, not rateable.

The defendants in error are not rated in this case for the fire-engine, which raises the water to the pipes and trunks: for the verdict finds that to be separately rated in the same proportion with the property of the other inhabitants of the ward. Then the pipes and trunks which carry the water must be the property, that is meant to be rated. But this cannot be supported, because the pipes and trunks cannot by any cultivation be made to yield any profit of themselves. Neither can the water be made in any way the subject of this rate. The verdict does not find, that they have any property in the water, nor could it be so found: while it flows in the stream, till they have raised it and so appropriated it, it could not be the subject of property. The subject rated then can have been no other than *the profits* made by the labour and expence of conducting water from the *Thames* by the help of a fire-engine through trunks and pipes into the houses of those who hire and employ the defendants; for the fire-engine which raises the water from the *Thames* is, as I have stated, out of the question, because separately rated. Suppose they carried this water in *carts* or *buckets* instead of pipes, would they in that case be rateable? If they would be liable, what would you make the subject of the rate? Is it the *profits* or the *pump* from whence they draw the water? If there is no pretence to charge the profits, it can only be for the pump? and if this is liable, Why is the brewer's dray or the banker's shop exempted? The profits of *labour* are clearly not a rateable property within the statutes. If they were, under what authority, upon what principle of reasoning or distinction, are the profits of a *trade* or *profession* exempted?

3. As another ground of exemption I shall submit, that these are not merely the profits of labour, but of an *adventure*; which, in addition to the hazard of the capital in the first instance, is also liable

1783.

ATKINS & al'  
versus  
DAVIS & al'.



1783. <sup>ATKINS & al'   
 *versus*   
 DAVIS & al'.</sup> liable to great subsequent risque and expence. The very nature of this property, consisting of a fire-engine, of wheels, pipes, trunks and branches, being a machine in its frame, vast, nice and complicated, and its pipes and branches extending a great way into various parts of the city of *London*, the borough of *Southwark*, and the county of *Middlesex*, demonstrates that it must be subject not only to great *general* risque, but, from its situation in a large navigable river, subject also to that variety of accidents, which the ebbing and flowing of tides, floods, frost, the occasional breaking of ships and boats from their moorings, and in consequence striking against the works, necessarily must produce. Besides the general expenditure in the repairs of the wheels and trunks, the accident of the bursting of pipes or the burning of the engine may absorb the profits of a whole year. Even a small stick, getting under the boom laid across the arch, may, and in fact has produced an injury to the company of more than 2000/. I am aware, that no particular fact, unless made out in proof at the trial and inserted in the special verdict, can be insisted upon as having actually happened. However, though the particular circumstances of the very accident that is pointed out are not found by the jury, yet the Court will suggest to themselves the variety of casualties, inseparably incident to a property described as this is.

The law, my Lords, upon the wisest principles of policy holds out every possible encouragement to adventurers, engaged in expensive and hazardous undertakings; which, in the event of success, may become a public benefit. Such checks, as the argument on the other side must introduce, would damp the spirit and annihilate the plans of the most sanguine projector. In point of fact, a similar attempt, the supply of this metropolis with water by means of the New River, as is well known, ruined the first adventurer. But, suppose a project of this magnitude compleated, at what point of time would you begin to rate it? And in what manner is it to be done? As soon as ruin and bankruptcy stare him no longer in the face, would you begin *immediately*, and forget all the expences, labour, risque, and contrivance in the invention and completion? Or, independent of what might be allowed for the risque and merit of invention, would you wait until the adventurer is reimbursed? If so? Who is to keep the account and strike the ballance? The difficulties that have been suggested, would of themselves be enough to deter, even if the obvious impolicy, injury and injustice



tice did not prohibit the taxation of a property so circum-  
flanced.

That these are grounds of exemption, seems to be as well settled upon the authorities, as it is clear upon principle. In the *K. v. Rebowe* [a] it was adjudged, that a light-house was not rateable; though it was expressly stated in that case, that the duties paid to Mr. *Rebowe* by the ships which passed, or went into *Harwich* harbour amounted yearly to 1400*l.*; and they were holden not rateable upon this principle; that the profits were uncertain and depended upon the expenditures. In *Rowlls and Gell* [b] it was stated, that the duties of lot and cope, which were rated in that case, were paid and received by the plaintiff *without any risque or expence in working the mines*: and Lord Mansfield expressly stated, that that case turned upon a circumstance, the very opposite of which was one of the leading features of this; *i. e.* that there was no possible risque.

I will trouble your Lordships with only one other authority on this head of argument; and it appears to me that it is throughout, or at least in all its material parts, very strongly applicable to the present. It is the case of [c] the *K. v. the Inhabitants of Shalfleet*. The question there was, Whether an officer of the Salt-office was liable to be rated to the *poor* in respect of his *salary*? The case stated, that J. S., the appellant, inhabited a tenement in *Shalfleet*, and was an officer appointed by his Majesty's commissioners of the Salt-office for the purpose of superintending the salt works carried on in the parish aforesaid; for which he received a salary of 40*l.* *per annum* by monthly payments from the government; and was removeable from the said office by the commissioners at pleasure. That the salt works, which he superintended, have been and are assessed both to the land-tax and to the *poor*; and have constantly paid such assessments. That the officers appointed by the said commissioners for the purposes of superintending the salt works have been assessed to and have paid the *land-tax*; but it does not appear to this Court (the Court of Sessions) that such officers have been before this time rated to the *poor*. That the said J. S. is

1783.

ATKINS & al'  
versus  
DAVIS & al'.

[a] M. 12 G. 3. 1771. Bott. 384.

[b] E. 16 G. 3. 1776. Cowp. 451.

[c] H. 7 G. 3. 1767. 4 Burr. 2011. Sherrington's case.



1783.

ATKINS &amp; al'

versus

DAVIS &amp; al'

rated to the poor at the sum of 3 l. 18 s. upon the account of his said salary only. The sessions held the appellant not rateable.

It does not occur to me in what manner this case can be distinguished from that before the Court. There the officer's salary had been, in the same manner as the water-works here, assessed to the land-tax. There the officer had never paid to the poor rates; and in like manner the verdict in this case finds, that the defendants in error never paid any ward rate whatever. There it was also strongly urged, that, as these salaries had been thought to be fit objects of taxation to *the land-tax*, there was much stronger reason why they should be so to the poor; and that as they were expressly named in the land-tax act, it shewed they were fit objects of taxation in general, yet the Court of *K. B.* were unanimously of opinion "that that was not such a species of property, as "could be rated to the relief of the poor, as personal estate within "the parish."

I shall submit one other ground, upon which I conceive the defendants are intitled to this exemption. They are not inhabitants. The verdict does not find them to be so. They do not live in the ward. They pay no ward rates. They have, it is true, some local property within it; which may make them liable as inhabitants to the extent of that property, but not beyond: and for this the jury find they have been already separately rated, and have paid in common with the other inhabitants of the ward. A great part of their works, such as the wheels, pipes and other instruments used for the purpose of raising and conveying the water, is situated on the *Southwark* side of the river. The pipes and trunks branch and extend to various other parts, into *London*, *Southwark* and *Middlesex*. The point then, to which I would wish to direct your Lordships' attention is, that they certainly are not rated in this case as *inhabitants*, but as *occupiers* of property rateable: that the defendants would clearly not be rateable under the words of the 43d of *Eliz.*, which mentions only occupiers of lands, houses, tithes impropriate, appropriation of tithes, coal-mines or saleable underwoods; nor would they be rateable within the *spirit* of that statute, which meant, that *occupiers* should be rated only in respect of things there visible, and such also as yielded a certain profit. That therefore, being altogether without the *aim and equity* of the act, they are not in point of fact charged in that character, which alone can make them subject within the *letter* of it.

I trust



I trust therefore that your Lordships will not, contrary to all experience and practice, without any legal precedent, and by construction only, upon an act of Parliament which has existed in full force for more than two centuries, this day impose a burthen and create a charge; the mischievous consequences of which, as far as it may affect either the personal property of individuals or the interests of the public in that species of useful discovery, which will not then be hazarded, cannot by any sagacity be possibly foreseen.

1783.  
ATKINS & al.  
versus  
DAVIS & al.

*Uterius consilium.*

Wilson, J. for the plaintiffs in error stated, that the question, whether the company with respect to this property were rateable towards repairing the damages sustained by reason of the late riots, depended upon the stat. 27 Eliz.; to which stat. 1 G. 1. commonly called the *Riot Act*, refers? that by that statute, "inhabitants and dwellers are to be taxed according to their ability." He then argued, that one would think, that upon this statute the only question that could be made must be, Whether this property, which yields the company 2500*l.* a year, adds any thing to their ability? That it was objected, that from their contrivance, expence and hazard, these works ought not, and from their public utility could not be intended, to be rateable: But that if this were so, would not the legislature have inserted a clause of exemption in favour of all works of ingenious enterprize? that the sense and policy was on the contrary to make the burthen as general and extensive as possible.

Monday,  
Nov. 22.

That it has been insisted, that the statutes 27 & 43 Eliz. are co-extensive: that he should feel no difficulty in maintaining, that this was a property rateable under stat. 43 Eliz.; but that he was not bound to argue the point in that manner. That this was a tax imposed by stat. 1 G. 1.: that, if it had ever been in the intention of the legislature, that it should receive its interpretation or be in any way explained by 43 Eliz., would they not have referred to that statute rather than to that of 27 Eliz.? that the first of these acts must have been known and familiar to every member of the House of Commons; but the other only to a very few: and that it would by no means follow, that, even if this property was not rateable under the 43d, it would therefore be intitled to exemption under the 27th of Eliz.

Z z 2

That



1783.

ATKINS & al.  
versus  
DAVIS & al.

That it had also been objected, that these profits were *casual*: that if by *casual* is meant that they are not *annual*, the fact is contradicted by the verdict: that, if by *casual* they meant *uncertain and liable to risque*, this is the case with respect to all property in the kingdom: that in the first sense of the word therefore it was not true; and in the other was nothing to the purpose: that the case of the *K. v. Vandewall*, which had been cited to shew that *casual* profits were not liable, did not apply: that quit-rents, which are services, are not exempt because they are *casual*: but that the true principle of that decision was, that being profits issuing out of lands, the lands had paid once; and if afterwards the quit-rents were charged, would be doubly taxed, would to that extent be made to pay again.

That this has been compared to the case of the profits of *labour and skill*: that these are not rateable; but that such is not the present case: that it is true, that besides the *labour* there must be found something local and visible to be made the subject of charge: that here the *water* is such: that a property has been acquired in it by occupancy: that, when by their mechanism and labour they have possessed themselves of it and the whole has a local and visible form and becomes of considerable value, it is that value that is rateable [a]. That, if that property were not rateable, the value of which is improved by labour, the poor would go almost without a provision: that the labour and skill of a gardener will add no less than fifty times to the value of the natural produce of the earth; and that no man had ever questioned, that this property in its improved state was a fit object of taxation.

That this is a property, which in point of certainty and *permanency* stands upon as firm a basis as the capital or the foundations of the empire: that the tolls of the sluices of navigable rivers are a property of a class and character very similar to the present: that in the case of the *K. v. Cardington* the tolls of these sluices, which for a century and half after the grant of the navigation had never been rated, were, when they became a property of great value, assessed to the poor; and that assessment was adjudged legal: that this also is a

[a] See the opinion of Buller, J. in the case of the *K. v. Hogg*, E. 27 G. 3. 1787. ante, fo, 274, 75.



species of property rateable to the poor; but that whether it be so or not, it is clearly chargeable under the 27th of *Eliz.*; and that the plaintiffs under the authorities in *Saunders* and 2 *Inst.* were unquestionably inhabitants.

1783.  
ATKINS & al'  
versus  
DAVIS & al'.

Sir *Thomas Davenport* for the defendants in error contended; that as the statutes 1 *G. 1.* and 27 *Eliz.* had created the rateability in the present instance and no industry could furnish any case as a guide, the Court were naturally and necessarily led to the 43d of *Eliz.* for the solution of this difficulty: that the construction put upon that statute, which was in *pari materia* and under which a discussion of some branch of this subject was had almost every day, must form the rule of decision here: that the legislature has there enumerated those particular species of property, which in their idea might constitute ability, and were thereby subject to charge: that it was insisted, that under that act this property was rateable: how then, if ability generally will subject and the expression of one thing is not the exclusion of another, could it have been ruled; that a successful adventurer in a coal-mine is liable, but that an equal fund of wealth derived from a lead-mine is exempted? That the universal sense of mankind has also confined the idea of rateability to objects daily before them: that water, appropriated by occupancy, is a perfectly new description of property liable to this charge: that it is true, that property of this nature has been subjected by *special acts of Parliament* to the land-tax; but that, even if it were chargeable by *the general law* to the land-tax, that would not be a sufficient ground for supporting this assessment: that the case of a salary is precisely in that situation, and an adjudication directly in point [a]. It pays to the land-tax, but it is not rateable to the poor. That where a different mode of cultivation, or water, the natural produce of the earth, being impregnated with qualities that make it more marketable, improves the value of the land, such property must be rateable; but that this property is no more local, no more attached or annexed to the soil, than a weaver's loom; which has never yet been thought of as a subject rateable: and that if this must be considered as a profit issuing from something local and visible within the ward, it was yet intitled to exemption, as a mechanical invention, a great work and a public benefit.

[a] *Rex v. the inhabitants of Shallfleet.* H. 7 G. 3. 1767. 4 Burr. 2011. Bott. 46.



1783.  
 ATKINS & al'  
*versus*  
 DAVIS & al'.  
 Saturday,  
 Novem. 27.

Lord *Loughborough* Ch. J. now delivered the judgment of the Court of Exchequer Chamber; which consisted of *Skynner* Lord Ch. B. *Gould*, J. *Nares*, J. *Eyre*, B. *Holbam*, B. *Perrin*, B. and *Heath*, J.

The act on which the damages were recovered, and on which there is to be an assessment of those damages against other persons than those from whom they are originally recovered, is the riot act; which I need not particularly cite, because, as to the mode of levying it, it refers itself to the 27th of *Elizabeth*: it is to be made in like manner, and assessed as by the statute of the 27th of *Elizabeth*. By that statute the inhabitants and residents are the persons first mentioned, as those who are to pay. The mode in which they are to pay is ascertained by the 5th section. Two Justices of the peace are to assess and tax "rateably and proportionably according to their discretions all and every the towns, "parishes, villages and hamlets; and that after such taxation "made, the constables shall have power to assess *according to their* "abilities every inhabitant and dweller towards the payment of such "assessment as shall be so made by the Justices."

There is therefore first a rate to be made upon a district, and then the proportions of that rate are to be made upon every inhabitant within the district; and they have power to rate every inhabitant and dweller according to their ability. The first question therefore that arises upon this statute is, Whether the plaintiffs in the action can be deemed inhabitants and dwellers within the district, where the assessment has been made by the constables? And as to that, inhabitancy in the sense of the legislature, upon this statute particularly, has been expressly determined not to be confined to the local residence of the person within the district; but that in the sense of the law those are inhabitants, who have taxable property within the district, in the very expression of Lord *Coke* in his second Institute: those who have lands and tenements in their own possession within the district are to be deemed inhabitants: and in the case cited from 2 *Saunders* 423, *Leigh v. Chapman*, the same rule is laid down in the construction of this very statute.

That the plaintiffs in the original action have property within the district, there can be no dispute. They are in that sense of the phrase inhabitants and dwellers; and the nature of their property is such, that it is of a permanent, visible, annual, real value:



lue: it consists in rents collected for the use of water, distributed in the various parts to which the water runs: but the proper place, where the value of the whole is to be taken, is to be sure at the fountain head from which the whole is distributed: however it is not very material to consider that; for upon the present action it is certainly sufficient to warrant the levying of the distress, that there was a foundation to make a rate, and some property rateable.

Against this construction of the statute the principal argument which has been used, indeed the whole of the last argument was an endeavour to make it out; that by the 43d of *Elizabeth* property of this nature was not rateable towards the support of the poor; to which there seems to be many satisfactory answers.

The legislature has not referred itself to the 43d of *Elizabeth*, as the rule by which this assessment is to be levied, but to the 27th of *Elizabeth*. It is sufficient to say, it has not done it. But the 43d of *Elizabeth* is so well known an act, that it strikes me, that the legislature, not having referred to that as the rule of assessment but having referred to another, must have so done for some good and solid reason. This is not a constant, permanent, annual burthen, but to be borne only occasionally: and then the occasions themselves are very rare, and the rule by which the assessment under the two acts is to be made is different. The assessments here are to be made according to the abilities of the persons; that is, according to their existing abilities at the moment the event arises, that gives the magistrates and officers their authority to levy. The subject of the two acts is also perfectly different; the one being to raise an additional sum to answer a contingent and accidental charge, the other to raise a stated, constant income. There is another difference remarkable between the two: that the subject of the 27th of *Elizabeth* only takes notice of the persons to be charged "inhabitants" or "dwellers," and they are to be taxed according to their ability generally. The statute of the 43d of *Elizabeth* in a great many instances particularizes the taxable subjects: but (besides that) it would be a strange way of considering the 27th of *Elizabeth*, to determine the sense of that act by the exposition that has been made of a statute, passed a great many years afterwards and relating to a subject very different and distinct from it.

1783.

ATKINS & al'  
versus  
DAVIS & al'.

The



1783.

ATKINS & al'  
versus  
DAVIS & al'.

Wednesday,  
July 2.

An alms-  
house, wholly  
occupied by  
objects of a

charity or their attendants and of which *no profit is made*, although the absolute property of it is in the person who gives the alms, has no legal occupiers; and is not an object of taxation under the poor laws.

The opinion of all the Judges is, that the judgment that has been given below for the plaintiffs in the original action ought to be

Reversed.

Rex v. Peter Waldo, Esquire.

TWO Justices allow a rate made for the relief of the poor of the parish of *Mitcham* in the county of *Surrey*.

Upon the appeal of *Peter Waldo* Esq, alledging that he was aggrieved by being "over rated and charged," the sessions dismissed the appeal, confirmed the rate and stated the following case:

That Mr. *Waldo*, the appellant, being seised of a messuage at *Mitcham* let at eight guineas *per annum*, was rated and paid poor rates for it: about six years ago Mr. *Waldo* pulled down this house and built a new one on the same spot, furnished it and placed in it ten poor girls, some of the parish of *Mitcham* and others of the neighbouring parishes; where they were educated, maintained and brought up on his charity: and provided a woman and paid her wages as his servant to superintend them, instruct them in reading and working, and to qualify them for services. This woman and the ten children were the only persons resident in this house, which was solely appropriated for this purpose; and vacancies from time to time supplied at Mr. *Waldo's* discretion and choice.

Upon the motion for the rule to quash this order of sessions, *Palmer* cited the case of [a] the *K. v. the Inhabitants of Saint Bartholomew the Less*, to shew that the defendant could not be considered as the *actual* occupier; and also that of [b] the *K. v. the occupiers of Saint Luke's Hospital*, to shew that the defendant, who derived no profit from this house, could not, during its application to the present uses, be any more considered as interested in the subject than the nominal trustees in that case, and consequently

[a] Tr. 9 G. 3. 1769. 4 Burr. 2435.

[b] M. 1 G. 3. 1760. 2 Burr. 1053. 1 Blackst. 249.

that



that they were in no sense, and not even *constructive* occupiers.

And now *Mingay*, who was to have shewn cause in support of this order of sessions, began to state, that, though this was the case of a house wholly appropriated to charitable purposes and occupied solely by the objects and ministers of that charity, yet it most materially differed from the cases that had been cited; as there the buildings were for ever and irrecoverably dedicated to the public service; but that this was a mere temporary appropriation and the building might be resumed at will by the defendant, its unquestionable owner: when the Court, without hearing either side, said, that the case was too clear for argument.

Lord *Mansfield*.

The Court took the distinction yesterday [a]. Mr. *Waldo* makes no profit of this building: and it is sufficient, that this is so in fact, and the profit is here in fact applied to public and charitable uses.

*Buller*, J.

Do you mean to argue that if a man gives all he has in charity, he shall apply something more in charity?

*Willes*, J. concurring,

Lord Commissioner *Ashturst* was absent.

Rule absolute, and  
Order of Sessions, setting  
aside the Rate, quashed.

[a] In the case of *Robson v. Hyde & al'* ante p. 310.

R. v. Inhabitants of Grendon Underwood.

Monday  
July 7.

TWO Justices by an order remove *William Baseley*, *Sarah*, his wife and their three children, from the parish of *Grendon Underwood* in the county of *Buckingham* to the parish of *Deddington* in the county of *Oxford*. The sessions on appeal adjudged the settlement to be at *Grendon Underwood*, quashed the order and stated the following case:

ing again to the same master three days after Mich. till the same Mich. ensuing, though at different wages and for a different service, will connect to give a settlement. An agreement made part of a hiring for a year from Mich. to Mich., that the servant is to go into the service three days after Mich. is an absence with leave; a dispensation, and not an exception from the original contract.

Services under a hiring a few days before Mich. expressly for a year, i. e. from Mich. to Mich. and under a hiring



1783.

REX

versus

Inhabitants of  
GRENDON  
UNDER-  
WOOD.

That *William Baseley*, the pauper, was born in the parish of *Deddington*: that at *Bicester* hiring fair 1773, which was the *Friday* before *Michaelmas* day (old style), he hired himself from *Michaelmas* (old style) for a year to *John Head*, a farmer at *Grendon Underwood*, to be his carter: that he had 1 s. earnest, and was to have 6 l. wages, and go into his master's service the *Wednesday* after *Michaelmas* day (old style): the pauper accordingly came that day in the afternoon to his master's at *Grendon Underwood*, where he had some refreshment; and his master told him he had hired another servant in the place he had hired him to do; but that he wanted a man to milk and go to plough, and if he liked that work he might stay: the pauper, thinking himself not well used, refused that service, and the master told him he might keep his earnest and go about his business; upon which the pauper said, "am I at liberty to hire myself to any other person?" and his master answered him in the affirmative; both the master and pauper looking upon themselves at liberty from their contract with each other. Upon this the pauper left his master's house, taking his cloaths away with him, and went to an alehouse at *Edgcott*, another parish about half a mile from *Grendon Underwood*; and in the course of the same afternoon the master met with him at the alehouse and hired him to serve the place of milkman and to go to plough, and gave him 2 s. 6 d. earnest, and agreed to give him 6 l. 6 s. wages, to serve him from that time till *Michaelmas* (old style): upon which the pauper immediately entered into his service and continued therein till the next *February*; when, his master's carter having left his place, his master hired him to serve the place of carter from that time to *Michaelmas* (old style) and gave him 1 s. earnest, and agreed to give him 10 s. 6 d. additional wages; and the pauper continued that service till the next *Michaelmas* (old style) and received his wages.

Settlement at  
*Deddington*.

It was admitted upon the argument and appeared upon the Almanac, that *Michaelmas* day old style was in 1773 upon a *Sunday*.

*Cowper, T.* and *Whitchurch* shewed cause in support of the order of sessions; and insisted, that there was here both a hiring and service for a year: that what the law chiefly considers is the credit given; and then only requires that this should be evidenced by a retainer for a year: that such there was here: that though for the three first days the pauper was absent, he was no otherwise *sui juris* than



than as he had the permission of his master so to be: that he was then constructively, though not actually, in his service. That it was true that the master and servant had on the third day consented to avoid the contract; but that, as they had agreed again on the afternoon of the same day, this could not operate as a discontinuance; as it had been settled in the case of [a] the *K. v. the Inhabitants of Ellisfield*, that there can be no fraction of a day: that it was there said, that the case of [b] the *K. v. the Inhabitants of Fifehead Magdalen* had been determined upon the same principle; but that at any rate that case, as reported, had decided that a temporary suspension of the relation of master and servant for no greater a length of time than that of the present case, would not amount to a discontinuance. That, as an absence with leave was equivalent to actual service, this circumstance distinguished the present case from that of [c] the *K. v. the Inhabitants of Winterset*; inasmuch as there no leave having been given the contract never commenced.

*Bearcroft* and *Wilson, G.* argued in support of the rule to quash the order of sessions; and *Bearcroft* insisted, that tho' a parting, a mere absence for an hour after a final settling of accounts, would not disconnect two services, yet there must be a contract for a year; which here there was not, or at least not any of that description, under which any service ever commenced: and that even if there had, the subsequent hiring for less than a year, under which only the service was performed, would not couple with a contract which was not *ejusdem generis* in every sense; being not only for different wages, but in a different character and with a view to [d] employment in a very different species of labour.

*Wilson, G.* contended, that there was here neither a hiring for a year, nor a service for a year: that there was no such legal *hiring*, for that the first contract, to enter upon the service three

1783.

REX

versus

Inhabitants of  
GRENDON  
UNDER-  
WOOD.

[a] H. 17 G. 3. 1777. ante p. 4.

[b] M. 11 G. 2. 1737. Burr. Settl. Cas. 116.

[c] E. 23 G. 3. 1783. ante p. 298.

[d] It has indeed been holden, that *hirings* not *ejusdem generis*, as a weekly and a yearly hiring, will not connect. *Rex v. the inhabitants of Winton* otherwise *Wrinton*. M. 22 G. 2. 1748. Burr. Settl. Cas. 280.: but in the case of the *K. v. the inhabitants of Bagworth* this difference in the two contracts was disregarded; and the Court were of opinion, that, where the *services* were the same, and under each hiring the servant a menial servant, two hirings might be connected. E. 22 G. 3. 1783. ante fo. 182. note b.



1783.  
 ~~~~~  
 REX
 versus
 Inhabitants of
 GRENDON
 UNDER-
 WOOD.

days after *Michaelmas*, could not be so considered, the absence stipulated for being an exception from the original contract, a matter of right and not of dispensation: that, where a servant absents himself even without consent during the term, at any time after the contract is once made, it may be purged; but, when his title to absent himself is made part of his contract, it cannot. That, though the exercise of authority in a master may be matter of discretion, the power of coercion, the right of controuling his servant, must attach upon every instant of the term to constitute a legal service; and that here on the contrary the very terms of the contract created an independance in the servant, inconsistent with the very nature of the relation.

He also insisted, that there was no *service* for a year: that the whole conclusion, to be derived from the authorities of the *K. v. Fifehead Magdalen* and the *K. v. Ellisfield* cited on the other side, was; that a short interval, by which generally the subsistence of a relation between parties might be suspended, or in very strictness be said to have ceased, would not as applicable to the relation of master and servant be considered so to disunite and sever two services, *actually commenced* under a renewal of such relation, as to abolish all claims consequent thereon and prevent a settlement. But that in this case there was no commencement of the *first service* at all: that, before it commenced, a total end by mutual agreement was put to the contract upon which it was founded: that it is therefore the case of a mere naked hiring *without any service whatsoever* under it; a thing, to use the language of Mr. Justice Buller in the case cited of the *K. v. Wintersett*, executory only: that such an executory contract for a year could not (and had not in any instance been so holden) be coupled with a subsequent service under a contract for less than a year: that this therefore brought the present case directly within the letter as well as the principle of that of *Wintersett*, from which it was impossible to distinguish it.

Lord Mansfield.

It is lamentable that the poor laws should have produced so many decisions, each of them going upon their own circumstances. In this case it is expressly stated, that on the *Friday* before *Michaelmas* day the pauper was hired for a year from *Michaelmas*. It is then expressly stated, that they stood in the relation of master and servant from *Michaelmas* to *Michaelmas*. If so, it would be repugnant

pugnant to say, that this was not a hiring for a year. The case itself contradicts the idea, that it was a hiring from the *Wednesday* after *Michaelmas*. Then the absence was matter of indulgence on the part of the master; and, whether revocable or not, is so common in these transactions and so reasonable upon the commencement of a service, that it never has been considered as impeaching or affecting the validity of a contract. But under all the circumstances I consider it as an indulgence, which the master might revoke: what passed upon the *Wednesday* was a conversation respecting the different kind of labour, in which the master then proposed to employ the servant. The servant gives up his objection; the master betters his wages; and the service goes on and is completed. It seems therefore to be a hiring and service for a year without any interruption on account of the short disagreement.

Willes, J.

The case of *Wintersett* is very different from the present. There, after an absence of a month, the mistress refuses to receive the servant without a new contract; under which the servant submits to make a compensation to the master for lost time during his absence; here on the contrary the master, having disappointed the servant of the service intended, makes a recompence to the servant by giving him another service and additional wages. Nice distinctions, subtilties, must not be admitted to deprive a man of his settlement. As to the rest, as the whole was the transaction of a day, this case seems to be governed by that of *Ellisfield*; where the Court would not allow of the fraction of a day.

Buller, J.

Whether in this case there was a sufficient service or not depends upon the hiring? The whole therefore turns upon the first question made, whether here is a hiring for a year? for if there was not, there could be no valid service for a year. That question then depends upon the terms of the contract: and in this as in all other contracts, by the universal rule of expounding them, all the words must have effect given them, if possible. Now the whole of the argument on the other side turns on giving only part of them effect. The case states expressly a hiring for a year; and, if you construe the conduct of the servant in not coming into his service till the *Wednesday* as an act of right, founded upon an exception in the original contract, you overturn that contract; whereas by construing it as a license or dispensation you give effect

to

1783.

~

REX

versus

Inhabitantsof

GRENDON

UNDER-

WOOD.

1783.

REX

versus

Inhabitants of

GRENDON

UNDER-

WOOD.

to the whole. If then, after the hiring for a year which is expressly stated in the case, the leave of absence was given, absence by leave is the same thing as service.

Upon the ground that the service here never commenced, the case of *Wintersett* has been relied upon; but does not apply. In that case the pauper did not go to his place till a month after his term commenced, and never sent any notice why he did not go. There did not appear to have been any communication of any kind between his master and the pauper during all that time, much less any intimation of his illness and inability to come: neither did it appear, at the time of the new contract being entered into, that he insisted upon or any way brought forward this plea. Therefore, though the act of God discharges the obligation of actual service, it did not appear, at the point of time to be looked to, the time when the first contract was rescinded, that the case came under that rule. It follows, that the pauper was there hired for eleven months only, and that no annual service ever commenced.

Lord Commissioner *Ashurst* was absent.

Rule discharged, and
Order of Sessions, quashing the
Order of two Justices, affirmed.

Michaelmas

Michaelmas Term

24 Geo. 3. 1783.

Rex v. Inhabitants of Chew Magna.

Wednesday,
Novem. 12.

TWO Justices by an order remove *John Carver*, *Anne* his wife and their five children, from the parish of *Chew Magna* in the county of *Somerset* to the parish of *Ubley* in the same county. The sessions on appeal adjudged the settlement to be at *Chew Magna*, quashed the order and stated the following case: Pauper, intitled as one of the representatives of an intestate to part of a leasehold estate, occupied by a tenant, and in the actual enjoyment of his proportion of the rents, does not, by paying upon demand by the overseer a poor rate made upon the occupier, acquire a settlement.

That the pauper, *John Carver*, being settled at *Ubley* about the year 1770, came into the parish of *Chew Magna*, where he married one *Anne Hippesley*: the said *Anne Hippesley*'s mother was entitled to a leasehold estate, consisting of three acres and an half of ground in the said parish of *Chew Magna* for a term of years, determinable with one life. The mother died intestate in 1775; leaving the pauper's wife, a son and another daughter: no letters of administration were granted of the mother's estate: the premises during the mother's life were rented by *Jane Harvey* at a rack rent of 4*l.* 10*s.* a year; and after her death continued so to be. That after the said mother's death the pauper received a third part of the rent from the tenant: Soon after the mother's death a poor rate was made, in which the premises were rated in the

1783.

REX
versus
Inhabitants of
CHEW MAG-
NA.

Settlement at
Ubley.

the following words: "*Occupier* of late Mrs. *Hippesley's*: 3 s. "2 d. 4.;" and the *overseer* applying to pauper, he paid such rate twice: at this time the pauper resided in the parish of *Gbew Magna*; *Harvey* continuing in the occupation of the premises.

Franklin shewed cause in support of the order of sessions; and admitted, that now, since the determination of the case of [a] the *K. v. the Inhabitants of North Curry*, he could not maintain that the pauper, who was not sole next of kin, had without administration acquired a settlement by an estate of his own.

But he insisted, though the pauper was not strictly the occupier, that he was yet sufficiently so for the present purpose: that he was not only interested generally in the amount of the rate, inasmuch as it could only be from a correct knowledge of the outgoings that he could be enabled to form a just estimate of his property; but must under the circumstances of this case be taken as the real occupier: that it would be too much to suppose almost in any case that the parish, by whom the charge is made, could be ignorant of the person upon whom they made it; but that in the present they by making the demand had ascertained it, and he by making the payment upon such demand had established it beyond all controversy, and intitled himself to the benefits to be derived from it: and that in the case of [b] the *K. v. the Inhabitants of Stapleton*, a resident in the parish, though not the real occupier, having been charged as occupier and called upon by the parish and having paid, was holden to have gained a settlement.

Lord Mansfield, (stopping Gould.)

To be sure, if the facts were otherwise, so also would be the law. The whole turns upon supposing the landlord and occupier to be the same thing; which they are not. Nothing is better understood than the distinction between them. If then it is clear that no settlement has been here acquired by estate, it is equally so, that none has by the rate; which is upon the occupier.

Willes and *Buller*, Justices, concurring,
Lord Commissioner *Ashburst* was absent.

[a] M. 22 G. 3. 1781. ante p. 137.

[b] M. 10 G. 3. 1769. Bott. 335. Burr. Settl. Cas. 649.

Rule absolute,
Order of two Justices affirmed, and
Order of Sessions quashed.

1783.
~
REX
versus
Inhabitants of
CHEW MAG-
NA.

Sed Vide the cases of the *K. v. the Inhabitants of Walsall*,
M. 18 G. 3. 1777. ante p. 35. and the *K. v. the Inhabitants of*
Heckmondwicke. H. 21 G. 3. 1781. ante p. 103.

Rex v. Inhabitants of Little Bolton.

Saturday,
Nov. 22.

TWO Justices by an order remove *John Wylde, Lucy*, his wife
and their six children from the township of *Great Bolton*
in the county of *Lancaster* to the township of *Little Bolton* in the
same county. The sessions on appeal confirm the order and state
the following case:

An agree-
ment for a
year to teach
a trade, the
pauper being
to find him-
self in neces-

saries and the master to have half his earnings, if he is not retained *eo nomine as an apprentice*, is a suf-
ficient hiring to give a settlement. The intention of the parties at the time must decide, whether a con-
tract be in the nature of an apprenticeship or of a hiring and service. They are not convertible.

That the pauper, being legally settled in the township of *Little Bolton* and being unmarried and having no child, went into the township of *Great Bolton*, where one *William Stott*, a weaver, lived: the pauper went to *Stott* and asked him, if he would teach him to weave counterpanes: *Stott* answered, he would teach him, if he would work with him two years and an half or three years; and the pauper's earnings were to be divided between them: the pauper was to find himself with meat, drink, washing and cloaths: he was engaged on these terms, and an agreement in writing was entered into accordingly. The pauper staid and worked with *Stott* under this agreement in *Great Bolton* about a year and half, and then the pauper gave the master twenty shillings to be free, having then married: he then worked journey work with the same master near a year: the master (whilst he was working under the agreement) found him looms, loom room and materials: he never employed the pauper in any work but weaving: the condition upon which he taught the pauper to weave was one half of his earnings. *Stott* received the money and paid the pauper one half, and looked on it that he had a right to receive it; but sometimes he let the pauper receive it. The agreement in writing was

Settlement at
Great Bolton.

1783.

REX
versus
Inhabitants of
LITTLE
BOLTON.

proved to be lost, and therefore parol evidence was allowed to be given of it.

Cockell shewed cause in support of these orders; and insisted, that the only question was, what was the meaning of the parties at the time of the agreement: *i. e.* whether the pauper was taken in the character of an apprentice or a servant? that nothing could be better understood than the distinction between them; the one acting always for hire, the other for instruction or improvement: that this is a contract by which it is covenanted, that the pauper *shall be taught*, and is therefore in the nature of an apprenticeship; and, being as such defective, cannot be converted into a hiring and service: that this was so laid down in many cases, particularly in that of [a] the *K. v. the Inhabitants of Kingsweare*: that the object of the two contracts is plainly different; and that this case is therefore in point: that a hiring must import pay, which there was not here: that the state of the case in [b] the *K. v. the Hamlet of Walton*, (*Ferrison's case*) was as far as respects the present question precisely the same as the present, tho' the principal ground of the decision was different: that the legislature meant to prevent such apprenticeships; and, if the Court so far supported them as to give them any effect in gaining a settlement, there would be great danger that the statute would be eluded and the revenue defrauded.

Lee, Attorney General, and Sir *Thomas Davenport* were now called upon to support the rule to quash these orders; and contended, that this had not the smallest resemblance of a contract of apprenticeship; that the pauper was to have *half his earnings from the first*: that no such idea as this was ever entertained in a contract for an apprenticeship: and that this therefore must have been meant as wages: that the same objection might have been taken in the case of [c] the *K. v. the Inhabitants of Buckland Den-*

[a] Tr. 16 G. 3. 1776. Burr. Settl. Cas. 839. And also in more recent authorities, viz. the *K. v. the Inhabitants of Highnam*. H. 25 G. 3. 1785. post. p. — and the *K. v. the Inhabitants of Sandford*. Tr. 26 G. 3. 1786. 1 Durnford and East 281.

[b] E. 9 W. 3. Carth. 400. from whom it is copied by Mr. Bott. p. 282. Under different names and in different terms and years this case is reported in different books; but to the same effect in Comb. 445. 5 Mod. 328. Fort. 214. and 2 Salk. 479. In Skinn. 671. however the decision of the Court is stated to have been directly otherwise: upon which Mr. Bott observes, and it should seem very rightly, that "this report is totally the reverse of what it ought to be."

[c] H. 12 G. 3. 1772. Burr. Settl. Cas. 694. Bott. 297.

ham;

ham; which was argued solely on the ground of exception from the contract, and determined accordingly upon that point, which did not occur here: *viz.* that a servant need not under every possible circumstance be during every instant of his term subject to the controul of his master: that here, as there, there is a mutual agreement; a retaining and a contract to serve: that it was true it might be objected, that in that case there was a *hiring* found: that the hiring need not be stated in terms: that it is enough, if from the facts it appears to the Court that the pauper was actually in the character of a servant: that there was no technical virtue in the words "hiring or letting:" that when the sessions use words which imply a hiring, it is the same thing: that the Court would form their judgment whether it was a hiring or not: that here they have stated what is equivalent to it; for they have stated an agreement to work with the master for two years and a half: and that hiring must always turn on the nature of the contract: that the master in this case might have maintained an action against the pauper himself for not working, and undoubtedly against a stranger for seducing his servant: neither of which he could have done in *Ferrison's* case; and therefore that the state of that case was no more to the purpose than the decision.

That, with respect to the argument that a hiring must necessarily import pay, in the case of [a] the *K. v. the Inhabitants of Birmingham* the servant was to receive no pay but what he earned, the contract being "good earn good hire," and he could not have been compelled to work at all: and that, in the case of [b] the *K. v. the Inhabitants of Hitcham*, where the servant was to be taught by his master the trade of a carpenter, and by express agreement to have "no money by way of wages," the Court held it to be a hiring and service and a settlement.

Cockell now added, as it was admitted that the intention of the parties at the time of forming this contract must guide the decision, that nothing could be more important in the discovery of that intention than the use of a term so peculiarly appropriated as that of *hiring*: that this had ever been so considered by the Court: and that there did not exist a single authority, in which a settlement under a hiring and service had been supported without the use of

1783.

REX
versus
Inhabitants of
LITTLE
BOLTON.

[a] H. 20 G. 3. 1780. ante p. 77.

[b] H. 33 G. 2. 1760. Burr. Settl. Cas. 489.

1783.

~

REX

versus

Inhabitantsof

LITTLE

BOLTON.

this word, or some other fully equivalent: that it was expressly so in the case of *Buckland Denham*: that in the case of *Hitcham*, the phrase was "lett himself," and the employment of the servant was to be in different kinds of labour.

Lord Mansfield.

This is not a hiring and service. If an indenture were not made necessary, there could be no doubt as to its being an apprenticeship; for the pauper is *to be taught*, and pays a consideration for it, and is to do no other work: but, if these agreements were allowed to give settlements, there would be an end of indentures of apprenticeship, and also of the revenue [a] derived from thence.

Buller, J.

I should have been better satisfied if the cases had gone the other way; because when a man engages to work for another he hires himself to such an one: but the cases seem to have taken another turn, and if they have settled it, I adhere to the authorities. The rule was accordingly then discharged and both the orders affirmed.

But presently Willes, J. observed, that *Ferrison's* case cited by Mr. Cockell did not apply.

Buller, J.

That was the case of an agreement between a master and a third person, a tradesman, that he should teach his trade to the master's servant; the servant himself being no party. And the Court said they would look into the cases.

And now Lord Mansfield delivered the judgment of the Court.

We have looked into the authorities and we find that all those cases of apprenticeships, which have been holden to be defective and not convertible into hirings and services, speak of the pauper *as an apprentice*, and that he was to serve as such. There is no such statement here, and we are therefore of opinion that it is a good hiring and service.

Thursday,
Novem. 27.

[a] As an apprenticeship, like the present, for no longer a term than three years, does not intitle to set up a trade, it does not seem that the revenue could ever have been in any great degree affected by a fraud, of which the party practising it could not have the full benefit. And, as it has already been settled by a resolution of the Judges, in the case of *Wallen qui tam v. Holton*. Tr. 33 & 34 G. 2. 1760. 1 Blackst. Rep. 233, that serving as an apprentice for seven years does so intitle, this seems in point of extent to be carrying the mischief, if it were one, much farther.

Willes,

Willes, J.

The cases that apply are [a] the *K. v. the Inhabitants of Whitechurch Canonorum*, [b] the *K. v. the Inhabitants of All Saints in Hereford*, and the case of *Kingswear* cited in the argument.

Lord Commissioner *Ashurst* was absent.

Rule absolute and both Orders quashed.

But in the *K. v. the Inhabitants of Highnam*, where the written agreement did not in terms state an apprenticeship, yet, as the contract was proved to have been entered into with a view to an apprenticeship and in fraud of the revenue, the Court held that contract was not convertible and could not be considered as a hiring and as intitling to a settlement. *H. 25 G. 3. 1785. post.*

[a] Tr. 5 G. 3. 1765. Burr. Settl. Caf. 540.
[b] H. 10 G. 3. 1770. Burr. Settl. Caf. 656. So also in the case of *Salford and Storeford*. M. 5 G. 2. 2 Barnardist. 39. and that of the *K. v. the Inhabitants of Saint Mary Kallendar in Winchester*. Tr. 21 & 22 G. 2. 1748. Burr. Settl. Caf. 274.

Rex v. Inhabitants of Edisore, otherwise Hedfor.

Wednesday,
Nov. 26.

TWO Justices by an order remove *Elizabeth Wooldridge*, wife of *John Wooldridge*, and their three children from the hamlet of *Upton and Signet* in the parish of *Burford* in the county of *Oxford* to the parish of *Edisore* in the county of *Bucks*. The sessions on appeal confirm the order, and state the following case:

Upon the removal of a wife, it is enough in the first instance to prove her maiden settlement.

That on appeal counsel were heard on both sides. That the appellants proved by the testimony of *Elizabeth Wooldridge*, that she, the pauper, was born at *Offcomb* in *Devonshire*. The respondents then proved by the testimony of the said *Elizabeth Wooldridge*, that she was the wife of the said *John Wooldridge*; but no proof whatsoever was given by them of the husband's settlement.

Wilson, J. and *Morgan*, shewed cause in support of these orders; and contended, that the appellants had made no case; a married woman having no settlement of her own: that, the pauper being such, her settlement is her husband's settlement; and that

1783.

REX
versus
Inhabitants of
EDISORE.

that the adjudication that she is settled in *Hedfor* is consequently in effect an adjudication, that *Hedfor* was the place of her husband's settlement: that, in the case of [a] the *K. v. the Inhabitants of Higher Walton*, where upon the removal of a wife to the place of her last legal settlement, it was objected that it did not appear whether this settlement was in *her own* right or in that of her husband, the Court said, that "she could not be settled at any other place than where her husband was settled:" that, if the effect of the order is *prima facie* to fix the place of the husband's settlement, this presumption cannot be done away merely by shewing the place of the wife's maiden settlement: it can only, by shewing a settlement of the husband in another place. That it was immaterial upon the order of the proceeding, that no proof had been made on the part of the respondents: that they need not prove any thing: that every thing they rely upon must be presumed, till the contrary is shewn; as it was incumbent upon the appellants, who begin, to impeach the judgment.

Bearcroft, in support of the rule to quash these orders, insisted; that the Court would consider the facts stated, and not the practice of the sessions in making one side or the other begin.

Lord *Mansfield*, (stopping him.)

There is nothing at all in this case. The sessions have found the settlement of the wife, and it did not appear that the husband had any.

Buller, J.

The case cited by Mr. *Wilson* is not applicable: no fact is found there, [b] not a word of any settlement of the wife's; and the presumption is in favour of the order. But here the fact is contrary to the order.

Willes, J. concurring,

Lord Commissioner *Asheburst* was absent.

Rule absolute, and both
Orders quashed.

This point had been previously settled by many authorities: viz. in the case of the *K. v. the Inhabitants of Ryton*. H. 18 G. 3. 1778.

[a] H. 14 G. 2. 1740. Burr. Sett. Cas. 162.

[b] It was a motion to quash the order for want of sufficient certainty upon the face of it.

ante p. 39. The K. v. the Inhabitants of Hensingham. Tr. 22 G. 3. 1782. ante p. 206. and the K. v. the Inhabitants of Woodsford. H. 23 G. 3. 1783. ante p. 236.

1783.

REX
versus
Inhabitants of
EDISORE.

Wednesday,
July 2.

Rex v. Inhabitants of Andover.

TWO Justices by an order remove *Ann Day*, wife of *Thomas Day*, and their four children from the parish of *Andover* in the county of *Southampton* to the parish of *Lambourne* in the county of *Berks*.

Justices in an order of removal stating themselves to be justices for a "borough

"or town and parish" describe themselves with sufficient certainty.

The magistrates in the above order stated themselves to be "two of his Majesty's Justices of Peace for the borough or town and parish of *Andover*, &c."

The court of quarter sessions, being of opinion that the two justices had not with sufficient certainty stated for what *place* they were justices, "adjudged, that the order ought to be quashed for "irregularity upon the face of it," and quashed it accordingly.

Bearcroft shewed cause in support of the order of sessions; and contended, that so far from having any thing like precision and certainty, nothing could be more equivocal and uncertain than the form in which the order of removal was drawn: that if "and" had been substituted for "or", an intelligible meaning had been conveyed; but that, as it stands, the justices may be justices for the town and not for the borough, or for the borough and not for the town: but certainly not for both, nor does it appear for which.

Buller, J.

Whether for one or the other, enough appears to support the order; for both town and borough are coupled with parish. And they sufficiently appear to be justices of either of those places, for which they were empowered to make this order.

Lord *Mansfield* and *Willes, J.* concurring,

Lord Commissioner *Ashurst* was absent.

Rule absolute,
Order of Sessions quashed, and
Original Order affirmed.

Rex

Wednesday,
Novem. 12.

Rex v. Inhabitants of Endon, Longsdon and Stanley.

A tenant,
whose name
has once been
introduced
upon the
land-tax rate,
tho' it is ta-
ken off in the
same year in

consequence of his poverty and at his request, as the tax is a tenant's tax, is to be considered as rated by the parish, if they put no other upon the rate, and gains a settlement; tho' the landlord had previously been rated. Who is rated is a question of fact. The act for regulating the right of voting does not, in the form of assessment that it gives, prevent parishes from rating landlords or any other persons by name.

TWO Justices by an order remove *Thomas Lowell, Esq.*, his wife and their two children from the hamlet of *Tittesworth* in the parish of *Leek* in the county of *Stafford* to the united townships of *Endon, Longsdon and Stanley* in the same county. The sessions on appeal confirm the order and state the following case:

That *Thomas Lowell*, the pauper, being legally settled in the township of *Endon* in the parish of *Leek* in the county of *Stafford*, rented a cottage of *Lord Macclesfield* at *Lady-day 1776* in the hamlet of *Tittesworth* at the rent of twenty shillings a year: And at the time of taking it was agreed between the pauper and *Lord Macclesfield's* agent, that the pauper should pay the land-tax and all other taxes; but it did not appear, that this agreement was at any time known by the officers of *Tittesworth*. That the pauper entered at *Lady-day 1776* and continued in possession of the premises, till he was removed in *December last*; and during all the time was called upon by the parish officers of *Tittesworth* to pay and did pay the land-tax for the premises: but at *Michaelmas 1780* being ill and reduced in circumstances, he desired the parish officer that he might be excused; which the said parish officer promised to use his endeavour to do: and he never paid the land-tax after *Lady-day 1781*. And it appears from the rates of 1781 and 1782, that neither the pauper's name, or that of any other person living in the said premises, were inserted therein; or that *Lord Macclesfield* was rated for the same, though the pauper continued on the premises till *December last*: but it appears that some other premises of *Lord Macclesfield's*, in the occupation of *George Gillman*, were inserted in the assessments of 1781 and 1782 in the following manner; which were not inserted in any of the rates produced in Court previous to the rate of 1781.

Names

Names of Proprietors	Names of Occupiers	Houses and Lands	Sums Assessed
		ditto	£. s. d.
Earl of Macclesfield	George Gilman	House Land	0 0 5 $\frac{3}{4}$

1783.
 REX
 versus
 Inhabitants of
 ENDON,
 LONGSDON,
 and STAN-
 LEY.

The pauper lived in part of the said cottage, and during some of the time let the remaining part, together with half an acre of land, for three pounds and ten shillings *per annum*. In the land-tax assessment of 1776 and 1779 Lord Macclesfield was assessed for the said premises.

In the year 1780 the form of the assessment of the said premises was as follows.

Names of Proprietors	Names of Occupiers	Houses and Lands	Sums Assessed
		ditto	£. s. d.
Earl of Macclesfield	Thomas Lowell	House Land	0 0 5 $\frac{3}{4}$

The only rates produced were those for the said years 1776, 1779, 1780, 1781, and 1782. The said hamlet of *Tittesworth* maintain their poor separately; and the united townships of *Endon*, *Longsdon* and *Stanley*, maintain their poor separately from the rest of the parish of *Leek*.

Settlement at
 Endon.

Leycester and *Plumer* shewed cause in support of these orders; and it was insisted by *Leycester*, that this was not a sufficient rating for the purpose of giving a settlement: that it was clear from the words of Lord *Hardwicke* in the case of [a] the *K. v. the Inhabitants of Sarrat*, that the *charging* is the principal thing; and the reason given is, that "it may be, that the parish would not charge the pauper for fear of making him a parishioner." That it is established in the case of [b] the *K. v. the Inhabitants of Carshalton*, that the inserting of the name of the tenant is not alone sufficient: it must be inserted for the purpose of rating him: so that this proposition is plain, that the notoriety arising from the tenant's name appearing in the rate is not sufficient to intitle to a settlement: that, if it were otherwise, the demand of payment by the

[a] M. 9 G. 2. 1735. Burr. Settl. Cas. 74.

[b] E. 15 G. 3. 1775. Burr. Settl. Cas. 809, recognized in the case of the *K. v. the Inhabitants of St. John Southwark*. Tr. 19 G. 3. 1779. ante p. 62.

1783.
 REX
versus
 Inhabitants of
 ENDON,
 LONGSDON,
 and STAN-
 LEY.

parish might be [a] deemed sufficient proof of a pauper's inhabitancy being known to the parish; but that there must be a consent of the parish by rating to charge themselves with him: and therefore in the *K. v. Sarraf* the charging is said by Lord *Hardwicke* to be the principal thing; "for that is the act of the parish;" and cannot be that of any individual: that, as here *non constat* upon the face of the rate, who was rated, other circumstances of notoriety were necessary to be resorted to for the purpose of shewing who was intended to be rated: that there were collateral circumstances that pointed out the landlord as the person here intended: that it was a very material circumstance, that the pauper, tho' his name had indeed once been introduced upon the rate, had never at any time been rated: that on the contrary the landlord was shewn to have been charged upon the rate in the year 1776 and 1779; and that it must be presumed, though the evidence was not produced, that he had also been rated in the intermediate years: that under such circumstances a jury would not hesitate in finding this fact with the landlord, and that the Court below had so found it: that the time also at which the tenant's name was inserted in the rate deserved consideration: that it was in the year 1780, the time when an act passed [b] for regulating the right of voting at county elections; which act directs the very form of assessment here used for the land-tax rate: that it must therefore be presumed, that the tenant's name was now introduced for the first time merely in compliance with the requisitions of the act, and not with any view of making any alteration in the person charged.

Willes J.

It is true, that the act passed in 1780, but it was not to be in force till January 1781.

Leycester. Though it was not to take effect till then, it was yet public, generally understood, and probably acted upon. That the case of [c] the *K. v. the Inhabitants of Mitcham*, could by no means govern the present: that there were none of the many

[a] And this principle did altogether guide the decision of the Court in a former case; that of the *K. v. the Inhabitants of Walsall*. M. 18 G. 3. 1777. ante p. 35. Sed vide the case of the *K. v. the Inhabitants of Chew Magna* in this term.

[b] 20 G. 3. c. 17. s. 19.

[c] E. 23 G. 3. 1783. ante p. 276.

weighty circumstances that indicated an intention in the present case of rating the landlord to be found there: that in these sort of cases it is a little, that is sufficient to turn the scale; and that a material circumstance in favour of the tenant in that case did not exist here: *i. e.* the presumption that arose (and was indeed considered as decisive) from the title of the rate; and that, that being upon *inhabitants*, the word inhabitant under that statute imported occupier. [a]

Plumer also insisted, that, as by the statute cited it is now no longer in the power of parish officers to exercise any discretion and to omit the names of any occupier in the rate, this consideration raised the subject of the present inquiry into a matter of great public importance: that if the name of every occupier, however small, without being charged or meant to be charged, but in opposition both to the duty and inclination of the parish officer, must be entered upon the rate, and when entered, must on payment be adjudged to give a settlement, the law of settlements would be overturned: that the statute, which enacts that no person renting less than ten pounds a year shall acquire a settlement, would be altogether repealed: that the consequences would be the most mischievous and oppressive: that there would be an immediate and universal removal of all persons coming to settle in small tenements: that it had been universally understood, that there were scarce any means by which a settlement could be acquired by a man's own act, unless with the consent and judgment of the parish officers, founded upon the ability of the party, or his having or holding property to a certain amount, or in some way conferring some benefit: that here on the contrary there needed not any such credit or property; no consent, for the rating was not voluntary; no choice or exercise of judgment, for it was not necessary to be elected to any office; and that from the land-tax payments no benefit was derived to the parish: and that it would be not a little extraordinary, if such consequences were to arise from an act, passed without having the poor laws in the smallest degree in contemplation, but with a view and purpose totally foreign and unconnected with them. That if, upon the principle of notice, a payment without rating could be holden sufficient, what should pre-

1783.

REX

versus

Inhabitants of

ENDON,

LONGSDON

and STAN-

LEY.

[a] It did not appear what was the title of this rate.

1783.

REX

versus

Inhabitants of
ENDON,
LONGSDON,
and STAN-
LEY.

vent parole evidence, that a man was known to a parish, from giving him a settlement? But that the intention of the parish and not any notice, actual or constructive, was the principal ground upon which the Court decided the *K. v. Mitcham*, and the true ground: that the whole history of this transaction manifestly shewed, that it was the landlord who was intended to be rated; but that it was inconceivable, that it could have been the intention of the parish to rate, and by rating to incorporate as a parishioner, a man, who acknowledged his wretchedness and inability to support his independence.

Wilson J. in support of the rule to quash these orders was stopped by

Lord Mansfield.

The question is, who is rated? It is a question of fact. Here is no title to the rate; and upon the face of the rate it stands indifferent. What then are the circumstances? In the first place the parish officers have applied to the tenant and he has paid. He afterwards, in consequence of his poverty, applies to them to be exempted from payment in future. This is complied with, and what follows? They never charge any body else. They therefore thought the tenant ought to pay or nobody: and this is decisive, that the landlord was never intended to be rated. No inconveniences need be incurred from the provisions of the late act of Parliament: It does not prevent the parish from rating any body by name, as was done in the case of the *K. v. Garsholton*. They may still declare their intention to rate the landlord.

Willes and Buller, Justices, concurring,
Lord Commissioner Ashurst was absent.

Rule absolute, and
Both Orders quashed.

For the purpose of exhibiting at once a view of all the authorities upon this subject, I have thought fit to annex to this case two others, which would have regularly fallen within the period, which yet remains, and will form the concluding part of this work.

Michaelmas Term

25 Geo. 3. 1784.

Rex v. Inhabitants of St. Lawrence, Winchester.

Wednesday,
Novem. 24.

TWO Justices by an order remove *Charles Scullard, Susan* his wife and their three children, from the parish of *Eastmeon* in the county of *Southampton* to the parish of *St. Lawrence* in the city of *Winchester* in the same county. The sessions on appeal confirm the order and state the following case:

Land-tax is a tenant's tax, as between him and the public; and consequently where both

landlord's and tenant's names appear upon the rate, it is *prima facie* a rating of the tenant. Who is rated, is a question of fact.

That the pauper, *Charles Scullard*, his wife and three children, resided in the parish of *Petersfield* in the county of *Southampton* under a certificate from the parish of *St. Lawrence Winchester* in the same county, for some time previous to the year 1780: That he removed before the making of the assessment after mentioned with his said wife and family into the tything of *Eastmeon* in the parish of *Eastmeon* in the same county; and occupied a house there till the eighth day of *May* last, the day of making the order of removal: that *William Clark* was the proprietor of the said house: that on the 7th day of *June* 1783 a land-tax assessment for the tything of *Eastmeon* in the parish of *Eastmeon* was made in the following form: that the title of it was as follows:

“County

1784.

REX
versus
Inhabitants of
St. LAW-
RENCE,
WINCHES-
TER.

"County of Southampton,
to wit.

} For the tything of *Eastmeon* in the said coun-
ty: an assessment made in pursuance of an
act of Parliament passed in the 23d year
of his present Majesty's reign, for grant-
ing an aid to his Majesty by a land-tax,
to be raised in *Great Britain* for the ser-
vice of the year 1783:"

Rentals.	Names of Proprietors.	Names of Occupiers.	Sums assessed.
£. 1 0 3 ³ / ₄	Mr. Will. Clark.	Charles Scullard.	£. s. d. 0 4 0 ³ / ₄

That the pauper, *Charles Scullard*, after this rate paid the under-mentioned *Joseph Terrell* (who called at the pauper's said house with the said assessment) two shillings and an halfpenny, being for one half year of the said assessment; and the said *Joseph Terrell* gave him a receipt for the same in the words and figures following:

"October 20th, 1783, Received of Mr. *Charles Scullard* 2 s.
and ¹/₂. for half a year's land-tax for Mr. *Clark*'s house, due at
Michaelmas last past.

£ 0 2 0 ¹/₂.

per *Joseph Terrell*, Assessor."

Settlement at
Eastmeon.

That the parish of *Eastmeon* consists of seven tythings, of which the tything of *Eastmeon* is one; which several tythings are separately assessed to the land-tax: that the said *Joseph Terrell* was collector of, as well as assessor to, the land-tax.

Bearcroft and *Marshall* shewed cause in support of these orders; and *Bearcroft* insisted, as it had been decided in the case of [a] the *K. v. the Inhabitants of Endon, Longsdon and Stanley*, that who is the person rated, is always a question of fact, the landlord in

[a] M. 24 G. 3. 1783. ante p. 374.

this case was plainly that person : that the fact had been so found by the Court below : that the late act [a] having prescribed the form of the rate here used and also directed that the landlord should be rated, it must be taken that he, out of the issues of whose hands this charge is to be deducted, was the person meant to be charged : and that, as the receipt was given for Mr. *Clark's*, the landlord's house, this presumption could not be repelled by the single circumstance of the receipt having been given to the tenant.

Marshall also insisted, that, as independent of the receipt it was upon the face of the rate equivocal who was rated, extrinsic circumstances must be resorted to as a guide : that, unless it can be shewn that a pauper's name had been inserted there for the purpose of rating him, it is not enough that it appears there : that upon a general view, of the land-tax act [b] it must be considered, as it has been universally denominated, a landlord's tax : that in general the charge is, in conformity with this opinion, made upon the landlord : that, whatever private contracts may subsist and what hand soever deposits the money, it is he, who ultimately and substantially always answers the demand to the public : that in every clause and passage of the act in which he is charged with any other, he is charged in the first instance ; and is manifestly the object of taxation : that it is the land itself, upon which in *§. 4.* (the clause which creates the charge) the burthen is thrown : that it is in respect of his interest in the land only, that any person whatsoever is charged : that if it be said that the person, on whom the clause creating this charge throws it, is the person "having or holding" the land ; I then ask whom can this mean ? That there can be no answer to this inquiry at once so authoritative or more demonstrative than that which the legislature themselves in *§. 9.* (the next that touches this part of the subject) have given : that in this clause they direct the course to be taken by the collectors in making this demand : Of whom then are they to demand it ? In the first place, "of the parties themselves, if they can be found, or else — at their last abode, or — upon the premises charged : " that it is evident from hence, that the only persons that

1784.

Rex

versus

Inhabitants of

St. LAW-

RENCE,

WINCHES-

TER.

[a] Stat. 20 G. 3. c. 17.

[b] 17 G. 3. c. 3.

could

1784.

REX
versus
Inhabitants of
St. LAW-
RENCE,
WINCHES-
TER.

could possibly be meant in *s.* 4. by the description of "having or holding" must be those who are described in this clause as *the parties themselves*: that from the obvious unanswerable sense of the context there could be no other description of persons than the *owners or proprietors*; for the collector is required to make the demand next "at their *last* abode;" i. e. the *last* abode of *the parties themselves*. Now, if *the tenant* cannot possibly be pointed at under this description of his place of residence, it is not he who is *the party himself*; nor can he be the person described as "having or holding" in *s.* 4: that it is absolutely impossible that *the tenant* can be the person aimed at here; for he can only abide upon the premises charged: he can have no other abode: but *the landlord* has no necessary local residence, he cannot be confined to his demesne, but may remove and shift from place to place; his *last* abode is therefore uncertain: and consequently that it is manifest, that the persons having or holding, the parties themselves and the place of abode can be no other than the *landlord's*, and that of *the landlord*: that it appears that the only person, of whom there is any express designation, is the person of the owner or landlord; that this person is also first pointed out to the collector as the object of taxation; and also that this person's place is the first place to which his attention is directed. That then the last remedy, without any previous mention or reference to the *person* of the tenant, is given "upon the premises charged:" that, as somehow and somewhere a responsibility ought to be insured to the public and as the landlord's residence could not be ascertained and difficulties or delays might arise there, the public officer is therefore licensed to enter "upon the premises:" that it seemed to be a most reasonable intendment, that the person who is to pay is the person upon whom the charge is *prima facie* to be taken to lie; and that here, not only upon the general principle but upon the letter also, the tenant's act is plainly vicarious. It is not the tenant who is *rated*: he is only the person authorised by the act [a] to pay the sums rated.

That in the case of [b] the *K. v. the Inhabitants of Mitcham*, it had been argued from *s.* 64. which refers to the

[a] The words of the act are: "The tenants of all houses, lands and tenements which shall be rated, are required and authorised, to pay the sums rated, and deduct it out of the rent; and the landlords, both mediate and immediate, are required to allow such deductions. *s.* 17.

[b] *E.* 23 *G.* 3. 1783. ante fo. 280, 81.

double tax imposed in a former clause, *s. 60*, upon Roman Catholics, that as by express words the landlord only was subjected to the charge and payment and the tenant was expressly discharged, it was manifest that in the contemplation of the legislature the tenant must in all other cases have been otherwise at least equally liable to both: but that this clause afforded no such conclusion: that without it indeed, the premises here, as in all other cases, might have been resorted to; and that the particular and obvious view of the legislature was to prevent the Roman Catholic landlord from evading the proper payment by collusion with his tenant; through whose means it might have been contrived, that no more than the *single* tax should be received by the public: that upon the whole view of the subject this was therefore clearly a landlord's and not a tenant's tax.

That *s. 39*. provides, that, if "lands &c. shall be unoccupied" and no distress can be found on the same, the collectors, &c. "may at any time after distrain:" that under these circumstances it is impossible that any tenant could be rated: that a settlement can only be gained by a rating as well as a paying; and that it has been holden [a] that the charging is the principal thing: that it could not possibly therefore be meant as a tax upon him who could not possibly be charged or rated; but upon him only, for and on behalf or in lieu of whom in every case the payment must be made.

That to consider this case upon the late [b] act, though that act had been framed with a totally different aim, he contended that the assessors could not vary the form of assessments from that which is directed in *s. 3*: that to enter into this question was, he conceived, open to him; for that the case of the *K. v. the Inhabitants of Endon, Longsdon and Stanley* could not have been decided upon this act, as the rating then in question was previous to the time at which this act came into operation: that explanatory memorandums, notes pointing out who was intended to be rated, would be dangerous, and defeat what was really the aim of that act: that by *s. 4*. a penalty of 5 *l.* is incurred by the collector if he alters or defaces; and therefore no note annexed ought to be regarded: that by *s. 13*. the duplicates are made legal evidence. Can they then be altered by a parish officer?

1784.

REX

versus

Inhabitants of

St. LAW-

RENCE,

WINCHES-

TER.

[a] *Rex v. the Inhabitants of Sarratt*, M. 9 G. 2, 1735. *Burn Sett's Cas.* 74.

[b] 20 G. 3. c. 17.

1784.

REX

versus

Inhabitants of
ST. LAW-
RENCE,
WINCHES-
TER.

Lord Mansfield.

But this is after they have been returned to the commissioners or the clerk of the peace.

Buller J.

And so is the penalty, after they have been affixed to the church door, and after appeal had and the duplicate amended: but the note should be made before they are affixed to the church door, or at least before the amended duplicate is returned to the assessors.

Marshall. At any rate an act, drawn for the sole purpose of regulating the votes of freeholders at a county election, ought not to be permitted either to explain or vary or in any way affect the rights of a different class of persons, in the adjustment of their respective interests upon a subject matter quite foreign to its object and provisions.

Burrough in support of the rule to quash these orders insisted; that, whether this were considered as a question of law or of fact, the tenant was the person rated: that, considering it upon the face of the rate as a question of law, the land-tax was expressly adjudged in the *K. v. Mitcham* to be a tenant's tax: and that as here the names both of the proprietor and tenant appeared upon the rate, it was a clear legal inference, that the tax was imposed on him who was the proper object of it. That, taking it in the other view as a question of fact, the circumstance of the collector's calling at the pauper's house for the money, of the payment by the pauper and of the receipt given by the collector were enough also in this point of view to remove all difficulty and doubt; and that the words in the receipt "for Mr. Clark's house," were no more than a description of the subject matter of the charge, the thing for which the pauper paid.

Buller J.

You need not go any farther.

Lord Mansfield.

It has been decided over and over again that the occupier must be presumed to be rated, against whom the first remedy lies as between him and the public. Here his name is in the rate, and the officer receives of him. There is not a tittle to shew that the parish meant to rate the landlord. The receipt only describes the premises, upon which the assessment was made.

Buller, J.

It was expressly determined in the *K. v. Mitcham*, that the land-tax is *prima facie* a tenant's tax. Why? because all the remedies

remedies are against him : and, without some new ingredients in the case, the point ought not to have been stirred again. It was not said there, that you might not rate the landlord. You may. It is so holden in the *K. v. Endon, Longsdon and Stanley*; and Lord *Mansfield* said there, that "it is a question of fact, whether landlord or tenant is rated : and the sessions should state it : if they do not, the Court must collect it from the circumstances that appear to them ; and, if nothing appear to the contrary, the occupier must be presumed to be the person."

Willes and *Asbhurst*, Justices, were absent.

Rule absolute and both Orders quashed.

1784.

REX
versus

Inhabitants of
ST. LAW-
RENCE,
WINCHES-
TER.

Rex v. Inhabitants of St. James, Bury St. Edmunds.

TWO Justices by an order remove *Samuel Cross Purkis* and *Sarah* his wife from the parish of *St. James* in the borough of *Bury St. Edmunds* in the county of *Suffolk* to the parish of *Hopton* in the same county. The sessions on appeal adjudged the settlement to be in the parish of *St. James*, quashed the order and stated the following case :

Though the land-tax is a tenant's tax as between him and the public, yet if the names of both landlord and tenant

appear upon the assessment and the receipt given to the tenant states that the sum paid was assessed upon the landlord, it is a rate upon the landlord ; and the tenant does not acquire a settlement.

That the settlement of the pauper at *Hopton* under an hiring and service for a year was admitted. That the pauper, after the settlement so obtained, became an inhabitant and occupier of a tenement belonging to *Joshua Grigby Esq* in the parish of *St. James* in the town of *Bury* at the yearly rent of 5*l*; and had, during his residence there, paid the land-tax there when demanded of him by the officer : that the rate was thereupon produced by the parish of *St. James* ; the title of which is as followeth :

"Borough of *Bury St. Edmunds* in the county of *Suffolk*, for the parish of *St. James* in the said borough. An assessment made in pursuance of an act of Parliament passed in the 23d year of his Majesty's reign, for granting an aid to his Majesty by a land-tax to be raised in *Great Britain* for the service of the year 1783," and made in the following manner :

3 D 2

Names

1784.

REX

versus

Inhabitants of
ST. JAMES;
BURY ST.
EDMUNDS.

Names of Proprietors.	N. of Occupiers. Eastgate Street.	What assessed and where situate.	Sums	Assessed.
Joseph Grigby Esq;	Samuel Purkis.	Tenant.	£4 0 0	£0 4 0

All the other assessments are made in like manner: and it was likewise proved that the collectors, who are parishioners, did demand the said tax so assessed of the pauper, who paid the same: and they gave him a receipt in the usual printed form for it, in the words following, to wit:

“The 25th day of December 1783. Received of Mr. Samuel Purkis the sum of 4s., so much being assessed on the landlord for the third quarterly payment, pursuant to an act of Parliament for granting an aid to his Majesty by a land-tax to be raised in Great Britain for the service of the year 1783.

By John Lawrence, Collector.”

Settlement at
Horton.

Whereupon this Court doth adjudge that the pauper, Samuel Cross Purkis, by the above rating and payment, has acquired a settlement in St. James aforesaid.

Mingay shewed cause in support of the order of sessions; and insisted, that the sessions, by determining the settlement of the pauper to be at St. James's, had drawn their conclusion, that the tenant was rated and not the landlord: that it was this instant decided, that rating was a question of fact; and that, where both landlord's and tenant's names appeared upon the rate, it was the province of the sessions to find this fact of, Who was rated? [a] That it was settled [b] that the land-tax was a tenant's tax: that therefore at the time the rate was made the tenant was the person rated: that this could not be affected or varied by what happened afterwards between the collector and the pauper: that the rate is

[a] Rex v. Inhabitants of St. Lawrence Winchester. Vide the case immediately preceding.

[b] Vide the last case, and cases there cited,

the language of the assessor, the receipt is only the act of the collector. That this subsequent transaction ought not to change the nature of the fact, as evidenced by the most authentic instrument that the law knows upon that subject. That if the receipt shall be permitted to affect the rate, it will put every settlement under a rate in the power of the collector: that receipts were on these occasions frequently given to ignorant men: that to countenance this would open a door to great frauds: that the rate itself was the only safe guide: suppose the rate had said one thing and the receipt another? That the rate was made at the time and made first, and was therefore upon every principle intitled to a preference: that the tenant was subjected to all the inconveniences of being rated, and upon what principle was he to be deprived of the benefits? that the collector was not warranted by the rate in giving such a receipt, and that upon that ground the sessions might have decided as they did upon it.

Adair, W. and Le Blanc, in support of the rule to quash the order of sessions, insisted; that this was the reverse of all the former cases, for that here it appeared that the landlord was rated and not the tenant: that it was true that the rate itself was doubtful on the face of it, and that, if any principle was to be deduced from the cases generally cited upon the subject, it was, that, where it was left uncertain upon the face of the rate who was rated this might be explained by extrinsic circumstances: that the receipt did here explain the doubt, and shewed, that it was the landlord who was meant to be assessed: that in fact here is neither a rating or payment by the tenant: that, if the tenant is assessed, he certainly did not pay; for the receipt expresses, that the landlord paid: and no pauper can gain a settlement, without paying as well as being rated:

That if the Court, considering it as a question of fact upon which the sessions only could properly decide, are of opinion, that no decision has been made upon it, they must send it down to have the fact, whether the landlord was or was not rated, expressly found.

Lord Mansfield.

Regularly the fact ought to have been found; but to have it sent down would only create unnecessary expence, as the receipt is stated: and it does not appear that there is the smallest probability that any evidence beyond it can be added.

I stated

1784.

REX

versus

Inhabitants of
ST. JAMES,
BURY ST.
EDMUND.

1784.

REX

versus

Inhabitants of
ST. JAMES,
BURY ST.
EDMUND.

I stated in the last case, that where it was uncertain who was rated, where the rate is silent and there is no other collateral evidence to supply this defect, the law would presume that the tenant was intended to be rated; because *prima facie* it is a tenant's tax, and he is consequently first liable. But, where the landlord is expressly rated, or where there is any collateral matter to shew that he is intended to be, there the legal presumption may be rebutted. Here is a strong piece of evidence coming out of the tenant's hands, to shew that the landlord was the object of the rate.

Buller, J. This is not a presumption *juris et de jure*: it admits of contradiction. The receipt relates back to the time of the rate, and so it is not a rate of the tenant, but of the landlord: besides, the receipt is strong evidence as to the payment, that he paid it as agent to the landlord, as well as that the officer did not receive it of him in his own right: so that the tenant does not appear to be intitled either way.

Willes and Ashburst, Justices, were absent.

Rule absolute,
Order of Sessions quashed, and
Order of two Justices affirmed.

MUSEVM
BRITANNICVM

ERRATA.

ERRATA.

- Page 174. l. 22. for "exception" read "restriction."
192. l. 30. for "do" read "does"
226. l. 18. after "not" add "an"
281. Add to note [b] "Vide the K. v. the Inhabitants of Chew Magna,
M. 24 G. 3. 1783. p. 365."
291. l. 26. for "the defendant" read "Smith."
298. In the margin for "Stainburgh" read "Winterfett."
318. last line for "Law" read "Lee."
327. l. 6. for "rated" read "made rateable."
328. l. 5. for "one hundred" read "twenty,"
l. 6. after "paid" add "for the well."
333. l. 29 after "nor" add "were they rated."
336. l. 32. for "but" read "in."
337. l. 34. after "him," add "who never has so before been rated;"
338. l. 5. for "consequently was" read "continued to be"
382. l. 17. for "landlord's" read "landlords."

IN consequence of engagements that have arisen since the time of his last publication, the Author has been prevented from offering to the Public this part of his Work so early as it was his Intention to have done. The continuance of those engagements put it out of his power to fix the time, at which he shall be able to close his work by the publication of the remaining part.

TEMPLE,
FEBRUARY 10, 1789.
